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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1554

GRANDVIEW BANK AND TRUST COMPANY,
Petitioner,

vs.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent,

COMMERCE BANCSHARES, INC.,
Intervenor-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Grandview Bank and Trust Company prays that a Writ of Certiorari be issued out of this court to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on March 2, 1977, affirming an order of the Federal Reserve Board.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals printed in the Appendix hereto is reported as *Grandview Bank and Trust Company* v. *Board of Governors of the Federal Reserve System*, 550 F.2d 415 (1977) and the decision of the Federal Reserve Board is reported at 41 Fed. Reg. 12093, March 23, 1976, and is also printed in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on March 2, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), 28 U.S.C. 2101, and the court below had jurisdiction of the Petition for Review under 12 U.S.C. 1848, Sec. 9.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals has decided a federal question in a way in conflict with the decision of this Court in *Whitney National Bank* v. *Bank of New Orleans and Trust Company*, 379 U.S. 411 in that,

a) Bancshares is not a traditionally recognized bank holding company because its affiliates are doing business in a "unitary operation" and that the acquisition of New Bank would be *de facto* branch banking violative of Missouri's branch banking laws and contrary to this Court's holding in *Whitney*.

b) The Court of Appeals has held Bank Holding Companies allow parent banks to achieve indirectly that which branch banking laws directly prohibit and this is contrary to this Court's holding in *Whitney*.

2. Whether the Court of Appeals' decision is in conflict with the 9th Circuit decision in *First National Bank in Billings* v. *First Bank Stock Corporation*, 306 F.2d 937 (1962) and in conflict with its own decision in *Commercial National Bank of Little Rock* v. *Board of Governors*, 451 F.2d 86 (1971) in that,

a) In Little Rock: there were no common directors, as here; there were local officers but not here;

each bank had its own capital surplus and undivided profits; the banks were supervised by different regulatory authorities nor was the holding company identified with the affiliate to the public.

b) In Billings: there was only one common director; each bank had its own employees; one bank was national, the other state; each had different correspondent banks; each had its own books.

3. Whether the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, in that,

a) The Court of Appeals has held, in effect, that 12 U.S.C. 1842, The Bank Holding Company Act, has made a nullity of 12 U.S.C. 36, McFadden Act (branch banks) in that New Bank with "many of the attributes of a traditional branch bank" may ignore the restrictions of the McFadden Act and the Missouri branch banking law Sec. 362.105 R.S.Mo. 1969.

b) The Court of Appeals has decided that "the relevant market area" can be determined by the Board because of its expertise which was based on previous applications and determined to be the six county market rather than Jackson County alone, which holding is contrary to this Court's holding in *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963) and *United States* v. *Phillipsburg National Bank and Trust Company*, 399 U.S. 350 (1970).

c) Petitioner was denied due process because there were deletions in the record and it was denied discovery by deposition or hearing.

d) There was a conflict of interest in that the Chairman of the Board of Bancshares was a director

of the Reserve Bank at the time deletions from the record were made while it acted as the Board's investigator.

STATUTES INVOLVED

The statutes involved are lengthy and the pertinent text is set forth in the Appendix.

Review of the Board's order in the Court of Appeals was under 12 U.S.C. 1848 (Appendix, page A28).

> "Any party aggrieved by an order of the Board under this Act may obtain review of such order in the United States Court of Appeals. . ."

Bancshares sought the Board's approval for acquisition of the proposed New Bank under 12 U.S.C. 1842(a)(3) (Appendix, page A29).

> "It shall be unlawful, except with prior approval of the Board, . . . for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank. . ."

Petitioner protested the application under 12 U.S.C. 1842 (c) (Appendix, pages A31-A32).

> "The Board shall not approve—
>
> (1) Any acquisition . . . which would result in a monopoly . . .
>
> (2) . . . unless it finds that the anticompetitive effects . . . outweighed in the public interest . . . in meeting the convenience and needs of the community. . ."

Petitioner alleged that the acquisition would violate Missouri law prohibiting branch banking, R.S.Mo. 362.105(1) (Appendix, page A19) provides, in part:

> ". . . no bank or trust company shall maintain in this state a branch bank . . . except . . . as provided in Section 362.107. . ."

Restrictions on branches in Section 362.107 (Appendix, pages A19-A21) provides, in part:

> ". . . no such bank . . . may maintain . . .
>
> (1) more than two such facilities . . .
>
> (2) such . . . outside the limits of the city . . . or county in which the bank . . . is located . . .
>
> (3) such . . . located closer than four hundred feet . . . of another then existing banking institution. . .
>
> (4) such . . . without . . . approval of the director of finance. . .
>
> (6) national banking associations located in this state have the same but no greater right . . . as banks . . . organized under the laws of this state.

Missouri limited the total deposits of bank holding companies under Section 362.915 (Appendix, page A22) which provides, in part:

> "It is unlawful for any bank holding company to obtain control of any bank if the total deposits in the bank together with the total deposits in all banks in Missouri controlled by the bank holding company exceed thirteen percent of the total bank deposits in all banks in the state. . ."

The McFadden Act 12 U.S.C. 36 (Appendix, pages A24-A28) restricts national banks branchings in states to the state law and provides, in part:

> "the conditions upon which a national banking association may . . . operate a branch are the following:
>
> . . . (c) . . . (2) . . . at any point within the State . . . if such establishment . . . are at the same time authorized to state banks by the statute law of the state in question. . ."

STATEMENT OF CASE

Petitioner, Grandview Bank and Trust Company (Grandview) prays that a Writ of Certoriari be issued out of this Court to review the judgment of the United States Court of Appeals for the Eighth Circuit which affirmed the Federal Reserve Board's (Board) approval of an acquisition of a new national bank (New Bank) in Grandview, Missouri, by Commerce Bancshares, Inc. (Bancshares).

Bancshares was incorporated in Missouri in 1966 and became a bank holding company (BHC) in 1968 and acquired the majority stock of Commerce Trust Company, now Commerce Bank of Kansas City, N.A., which has 31 affiliated banks in Missouri as well as Compac Services, Inc., an automated data-processing service.

The Comptroller of the Currency granted preliminary approval to New Bank January 23, 1975, subject to certain conditions, one being "The new bank must be opened for business within one year or the preliminary approval is withdrawn" (R10).

On March 4, 1975 Bancshares executed its application to the Board, pursuant to paragraph 3(a)(3) of the Bank Holding Company Act of 1956, as amended, for prior approval of the proposed acquisition of New Bank (R5).

The Board approved the acquisition without a hearing on March 15, 1976, after the Comptroller's approval had been withdrawn (R435).

Bancshares, the third largest banking organization in Missouri, controls 31 banks with aggregate deposits of approximately $1.2 billion, representing 8.4 percent of total deposits in commercial banks in the State (R441).

The petitioner, a small bank, one sixty-second the size of Bancshares, challenged the Board's approval of the acquisition and the Court's affirming of the order on the grounds that the Board's findings on the branch banking, monopoly and financial resources issues are not supported by substantial evidence and that the Board denied it due process by not allowing a hearing and by deleting part of the record (Opinion, page A3).

Grandview claims that Bancshares' affiliates are doing business in a "unitary operation" and requests the Court to "pierce the corporate veil" and find that the acquisition of New Bank would be *de facto* branch banking violative of Missouri's branch banking laws, Mo.R.S. 362.105(1) and 12 U.S.C. 36, which restricts National Banks to the same branch laws, and thus the claim of Grandview that the Court's affirmation is contrary to this Court's holding in *Whitney National Bank* v. *Bank of New Orleans*, 323 F.2d 290 (5th Cir. 1963), rev'd on other grounds, 379 U.S. 411 (1965).

The Missouri Director of Finance had approved the application under Mo.R.S. 362.920 which restricts under Mo.R.S.

362.915 acquisitions over 15 percent of the total deposits in the state.

The Court of Appeals affirmed the Board's finding that Bancshares is a "traditionally recognized bank holding company" and that "a unitary operation will not exist between bank and any of applicant's other banking subsidiaries," nevertheless, the Court of Appeals held,

> "Although we are persuaded by Grandview's argument that New Bank will have many of the attributes of a traditional branch bank, we must hold that its attack is made in the wrong forum. Although many of the operations of Bancshares appear to be 'unitary,' they are not in violation of the Bank Holding Company Act. *See* 12 U.S.C. §1841 *et seq.*
>
> "Whether policy considerations favor adoption of BHC legislation or militate against it (by reason of the same competitive factors which restrict branch banking) is not a proper judicial concern. The argument that BHCs allow parent banks to achieve indirectly that which branch banking laws directly prohibit is not one which the courts should entertain."

The Board found New Bank would be a separate corporation with its own reserve requirements, capital stock; that it would have its own offices and "generally" separate board of directors, books of account, checks, stationery and was therefore a "traditionally recognized bank holding company."

The Court of Appeals considered the branching issue as to management, capital, surplus and undivided profits, loan limits and public identity and "de facto" operation. All of the factors the Court of Appeals found in the Board's favor

as being "traditional" but conceding Grandview is "correct in its assertion that Bancshares' advertising suggests a more unitary operation." (Opinion, page A6).

The Court of Appeals also conceded that Bancshares is "seeking to acquire a newly established bank in an area where it could not branch." (Opinion, page A8).

The capital of New Bank will be derived from Bancshares (R6).

Directors of New Bank are also common directors and/or officers of Bancshares and of its subsidiaries (R136-139):

Director of New Bank	Director and/or Officer Bancshares	Director of Commerce Bank of:
Gary L. Callaway	Vice President	Excelsior Springs Columbia St. Joseph
Konrad L. Heid	Vice President	Harrisonville Bonne Terre Festus
James H. Linn	Executive Vice President	St. Louis Mound City Trust Valley Bank of Florissant Compac Services, Inc.
John A. Meyer		Columbia
Peter Newquist	Vice President	Vice President Commerce Bank of Kansas City

Other interlocking officers and directors of Bancshares and its affiliates are set out in the record (R23-25, R136-139) and every director or officer is an officer or director of at least one other affiliate. Of Banchares' 15 directors and officers listed, one is an interlocking officer or director of seven other affiliates, three are interlocking officers or directors of six other affiliates, two are interlocking officers or directors of five other affiliates, four are interlocking officers or directors of three other affiliates, and one is an interlocking officer or director of two other affiliates. Bancshares' Chairman and President is the dominant policy maker, largest individual stockholder and serves on the board of several affiliates (R299).

Nevertheless, Bancshares contends New Bank will be managed by its own officers (R345) and so the Board found (R439) although Grandview pointed out that the local officers do not manage their own federal funds, nor the changes in bank personnel from one affiliate to another (18 such changes are listed in the record 236-238), such facts show unitary operation of personnel.

The Board found that New Bank would maintain separate books of account, but also noted that an affiliate, Compac Services, Inc., "may" provide automated general ledger service (R439). Six of the officers or directors of Compac are officers and directors of Bancshares (R136-139) and it does the same accounting work for the other affiliates (R234), and this would be done on a daily basis (R346). In other words, all deposits and all checks on all affiliates are handled by Compac.

The New Bank's capital will be provided for by Bancshares, except for director's qualifying shares, from Bancshares' own capital (R6).

The Board found that New Bank would issue "its own distinctive checks, and use its own stationery" (R439) but the record is void of any samples of such. Bancshares admits it engages in centralized advertising but claims "it does not represent to the public that those affiliate banks taking part therein act together in banking or trust business" (R100).

The New Bank's logo in the advertisement on page 426 of the record is identical to the anchor bank's on page 238 in its house organ and also identical to the advertisements on pages 334 and 336 of the record. All of the affiliates are "Commerce Banks" with the name of the city attached and with the same logo.

Nevertheless, Bancshares alleged to the Board that "there is little likelihood that Bank would be confused with Commerce Bank of Kansas City. . ." (R345) although all the affiliates share in the costs of the advertising and it is controlled by a central marketing department (R100).

The Board found that New Bank would have a loan limit based on its capital (R348) but Bancshares admits that loan limits, although statutory, ". . . under the holding company arrangement, Bank will not automatically have available to it the lending limits, resources, and other skills of the entire system, as does a branch bank. Bank will only have these benefits through the use of an integrated participation and liaison arrangement within the holding company system" (R97).

All of the affiliates are covered by the same blanket bond and the Comptroller found Bancshares will provide the key management team (R197); the books will be kept by an affiliate for all the banks (R439); unitary advertising and marketing will be used to confuse the public (R100); all

operations would be controlled by the interlocking officers and directors (R136-139); and all personnel would be used interchangeably with each affiliate (R236).

Bancshares admitted in its Y-6 filings with the Board that it exercised supervision over the activities of its subsidiaries in investment securities and investment policies; loans and lending policies; bank premises and other fixed assets; systems and methods of operations; insurance coverage and fidelity bonds; personnel and personnel policies; pensions, profit sharing and similar plans; dividend policies; audits; and determined fees for management services (R201, 232).

MONOPOLY AND RELEVANT MARKET

The Court of Appeals followed the Board's finding that the relevant market was the six-county area rather than the one county area urged by Grandview on the basis of the Board's expertise rather than any evidence determining the market in the record.

Grandview, Missouri, is a residential community in Jackson County, Missouri, with a population estimated between 18,000 and 23,000 (R55, 143, 378).

New Bank's service area was delineated as substantially the City of Grandview (R53) and 89 percent of Grandview's customers were within two miles of the bank (R284) and both areas are in Jackson County, Missouri.

Bancshares' anchor bank has 30 percent of the deposits in Jackson County (R258) and 30 percent of the deposits in Grandview. Bancshares through its credit card BankAmericard has potential loans in Grandview of over $1.3 million (R255).

There are 32 banking facilities within five minutes or ten miles of Grandview, Missouri (R195) and 57 banks in Jackson County (R268). Within the last four years, 14 new banking facilities have been created in south Jackson County (R273).

The Hickman Mills Bank is on the north edge of Grandview and its facility is on the south edge of Grandview (R53, 196). Bancshares admitted that eight banks now serve the area (R52).

Hickman Mills Bank has 18.5 percent of its deposits and 20 percent of its loans in Grandview. The Bank of Belton, just south of Grandview, has 14 percent of its loans in Grandview, and the Citizens Bank of Belton would have about the same (R269).

It is assumed that the large holding companies have one-half of the deposits in Grandview and Jackson County (R270).

The Comptroller found "ebbing growth" in the area; two of the major motels are in financial distress, the Sheraton Inn in bankruptcy, and the Ramada Inn foreclosed; and the Air Base in the area is to be closed (R266).

The Commissioner of Finance of Missouri denied a charter in 1971 for a bank in Grandview; denied a charter in Raymore, eight miles southeast of Grandview in 1974; and denied a charter to Indian Creek Bank, five miles northwest of Grandview, in 1973 (Raymore and Indian Creek are about 13 miles apart); and the Comptroller denied Bancshares' application of Martin City in 1973 (R252). Martin City's primary service area overlapped New Bank.

The Reserve Bank found that the services to be offered by Bancshares through the New Bank appear to be presently available from existing banks in the area (R295) (portions of this fact finding were deleted from this part of the record); that earning projections submitted by Bancshares for New Bank appear overly optimistic; that Grandview has experienced a sharp reduction in population and the stagnation may continue for some time; and the site of New Bank was poor in that it was not convenient (R295).

Grandview's evidence was that 89% of its customers were two miles or less from its banking house (R284). New Bank's primary service area is approximately 4 miles by 5 miles from the center of Grandview from which 75% of its deposits would come (R53).

Neither Grandview nor Bancshares offered any evidence of any substantial potential customers outside of Jackson County, Missouri.

The Board apparently based its determination of the market on "previous applications" and not on any evidence in this record (R231).

Bancshares' anchor bank controls about 30 percent of the total deposits in the City of Kansas City (R258). The Board defines "dominant banking organization" as one holding more than 20 percent in the "relevant market".

Grandview contended that the "relevant market" was Jackson County in which the City of Kansas City and the City of Grandview are located and in which New Bank and Grandview would have their customers and where Bancshares' anchor bank has its customers, under the definition of "relevant market" in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 356-361.

Grandview also contended that the Board in *First International Bancshares, Inc.*, 39 F.R. 1486 denied an application where the concentration of deposits exceeded 30 percent of the market and should so in this case for the same reason (R256), that is, break the force of a trend toward undue concentration.

Bancshares' anchor bank is in Jackson County, 16.4 miles from New Bank and other affiliates are 9.8, 9. and 21.3 miles from New Bank, and the Martin City facility is 3 miles away (R90, 449). Three of these affiliates have loans and deposits totaling over 1.5 million in the primary service area of New Bank (R91).

Bancshares admits that control of over 20 percent of the market is undue concentration and unlawful (R37).

DELETIONS IN RECORD AND CONFLICT OF INTEREST

The Board made numerous deletions in the record that were not before the Court of Appeals (R294-6, 299-301, 303, 313, 327, 328, 429-33, 452) and the Court of Appeals denied petitioner the opportunity to examine the record, pages 119-131.

The deletions were made by the staff of the Kansas City Federal Reserve Bank while a director of the Reserve Bank was simultaneously the Chairman of the Board of Bancshares and the Court of Appeals summarily dismissed Grandview's motion to examine the record in the case as "Non-meritorious" (Opinion A13).

Although not permitted by statute, Grandview contended it was denied due process because the Board did not hold a trial type hearing (Opinion A13-A14).

REASON FOR ALLOWANCE OF THE WRIT

This case involves an important question of federal law involving the failure of the Court of Appeals and the Federal Reserve Board to follow the applicable decisions of this court in respect to whether the Bank Holding Company Act has repealed the McFadden Act by allowing branch banking and whether a banking monopoly exists in the relevant market.

The Board's approval of the acquisition of New Bank here, ostensibly to enter the alleged monopoly market of Grandview, actually enhances the monopoly position of Bancshares. The Board has used as a relevant market the six county area rather than the realistic one county area in order to dilute the monopolistic posture of Bancshares which is sixty-two times as large as Grandview.

Grandview was denied due process, because there was no trial type hearing, and was denied any form of discovery; the record had numerous deletions hidden from the petitioner and the Court of Appeals and further the Court held in camera a portion of the record. The deletions were made while the Chairman of the Board of Bancshares was a Director of the Reserve Bank that made the investigation.

The Court of Appeals has in effect repealed the McFadden Act, 12 U.S.C. 36 in this case. The Court of Appeals affirmed the Board on the proposition that Bancshares was a "traditionally recognized holding company" citing *Whitney National Bank* v. *The Bank of New Orleans*, 323 F.2d 290 (5th Cir. 1963), rev'd on other grounds, 379 U.S. 411 (1965).

Grandview contends that Bancshares is doing in this case the same activity that was condemned in *Whitney*, and is also in conflict with 12 U.S.C. 36 which prohibits a national bank from establishing branches in Missouri since the State

prohibits branch banking under Section 362.105. The Court of Appeals recognized this at page A8 of the opinion but claims that such activity, clearly contrary to *Whitney*, is permissible under 12 U.S.C. 1841 et seq. The Board argued to the Court that it was specifically permissible under 12 U.S.C. 1843(a)(2)(A) (1970).

It is Grandview's contention that the law of *Whitney* and 18 U.S.C. 36 have not been changed by 12 U.S.C. 1841, 1843 and the Court of Appeals is in error.

The "traditionally recognized bankholding company" as now defined by the Court of Appeals is totally different from the one defined in *Whitney* and *Billings* and the holding of the Court of Appeals repeals the McFadden Act, 12 U.S.C. 36 to do so, or interprets 12 U.S.C. 1841 in a way that abrogates 18 U.S.C. 36.

Grandview contends the overwhelming evidence in the record supports its contention that Bancshares is not a traditionally recognized holding company and under *Whitney* the Board's order must be reversed.

Actually if one reads Judge Wilbur K. Miller's opinion in the *Whitney* case at 323 F.2d 290 it is clear that Bancshares is doing exactly what was condemned by Judge Miller.

Whitney's original stockholders formed a holding company and then used its undivided profits to form two banks (Whitney-New Orleans and Whitney-Jefferson County) contrary to the Louisiana Branch Banking Laws.

Here Bancshares was organized and incorporated under the General and Business Corporation Laws of Missouri in August, 1966 "for the purpose of acquiring a majority of the capital stock of Commerce Trust Company (now Com-

merce Bank of Kansas City, N.A.) and its two subsidiaries . . ." (R346). The purpose of this formation was the same as in *Whitney* to avoid the restrictions of the Branch Banking Laws of Missouri.

As in *Whitney* the new bank was initially conceived by Bancshares in order to establish a branch in the City of Grandview, Missouri (R7).

As in *Whitney* Bancshares could not, nor could its lead bank Commerce Trust Company, put a branch in Grandview, Missouri because of the Missouri law. In order to avoid this law the holding company was formed as in *Whitney* and the holding company provided the capital as in *Whitney* and applied through its officers to the Comptroller of the Currency for the authority to open a new national bank in Grandview.

In the *Whitney* case Judge Miller stated at 323 F.2d 290, 301:

> "This is a very good description of a branch banking operation, regardless of the fact that Whitney's president did not denominate it as such. The nature of the arrangement, and not the label applied to it, determines the character of the relationship between two banking institutions."

The Comptroller argued in *Whitney* that Whitney was the same as the *First National Bank of Billings* case, 306 F.2d 936, but Judge Miller stated at 323 F.2d 303:

> "The Billings case is far from being factually 'on all fours' with the present case. There the bank holding company was organized in 1929, and had been in operation in that capacity for 30 years. It possessed stock in 87 banks with 94 offices. Thus, it was not created

> or organized by a bank, as Whitney Holding was, solely for the purpose of opening a branch office of that bank. It was the traditionally recognized bank holding company which, with its own capital, invests in or buys the stock of banks. It was not the type of holding company here involved, whose only capital was the money siphoned through it by Whitney-New Orleans to open Whitney-Jefferson in a prohibited location."

Here Commerce Bank through its Bancshares is taking its own capital to open a new bank in Grandview in a prohibited location; Commerce Bancshares was formed only to avoid the branch banking laws of Missouri. It is not a traditional bank holding company such as described in *Billings*.

To emphasize this further, Judge Miller in *Whitney* also stated at 323 F.2d 290, 303:

> "We agree with the Ninth Circuit that the corporate veil should be pierced whenever one bank is 'doing business through the instrumentality of' the other or 'in the same way as if the institutions were one'. 'The unitary type of operation' said in the Billings opinion to be 'characteristic of branch banking' is present here. In such circumstances, the relationship of parent and branch exists, even though the banks are separate corporate organizations."

Again, Judge Miller in describing the Whitney transaction in which it is clearly shown it is the same as the transaction here stated at 323 F.2d 304:

> "Consequently, we pierce the corporate veil which shrouds these intricate transactions, and see Whitney-New Orleans attempting to establish a branch in Jefferson Parish in violation of 12 USC 36(c). It is a boot-

strap operation by which Whitney-New Orleans using its own funds in corporate maneuvering, seeks to establish a branch in prohibited territory. Like Jacob of Old, Whitney-New Orleans covered its hands with the Esau-like plan of reorganization and, despite the telltale sound of its own voice, obtained the blessing of the Comptroller of the Currency. Unlike Isaac, however, the Comptroller was not gulled by the ruse; acting ultra vires in the circumstances shown, he knowingly permitted it because he considered the end desirable, and because he thought the corporate maneuvering impervious to attack. But, when the corporate veil is pierced, it becomes apparent that both voice and hands were those of Whitney-New Orleans."

It is clear here that the voice and hands are of Commerce Bank, the alter ego of Commerce Bancshares.

The Court of Appeals seems to agree with the Board that even though Bancshares is openly and notoriously violating the rule of *Whitney*, nevertheless, that is within the contemplation of 12 U.S.C. 1243. Such a holding has no precedent.

In view of this, it might be well to recall Judge Miller's statement again in *Whitney* at 323 F.2d 304:

> ". . . the holding company is not providing Whitney-Jefferson with new and fresh capital, but with capital supplied by Whitney-New Orleans; the new bank will be managed and controlled by executives of Whitney-New Orleans; and the name, Whitney National Bank in Jefferson Parish (the last three words in small letters on its checks and other forms) is easily susceptible of confusion with the parent organization Whitney National Bank-New Orleans."

It is rather clear that Judge Miller's opinion in *Whitney* together with the Ninth Circuit's finding in *Billings* clearly show that Bancshares here is violating the Missouri Branch Banking Law and that it is not a traditional bank holding company.

Bancshares holds itself out as a bank, listing its assets as "cash", "securities", "loans", and liabilities as "deposits", "demand, time and savings", the same as any bank (R15-16). It is hard to understand how a "traditionally recognized bank holding company" would have "loans", "deposits", "interest on deposits" as a bank unless it is a sham. Its income statement is, as any bank, with "interest and fees on loans", "interest on money market obligations", "interest on investment securities"; likewise its operating expense is as a bank, "interest on deposits", "interest on borrowings", and "provision for loan losses".

A traditional bank holding company would have as assets the stock of other banks and its income would be from the dividends of those stocks.

The Court of Appeals and the Board acknowledge *Whitney*, but totally ignore its holding as to branch banking.

Whitney follows the holding of *First National Bank in Billings* v. *First Bank Stock Corp.*, 306 F.2d 937 (9th Cir. 1962) which was also followed by the 8th Circuit in *Commercial National Bank of Little Rock* v. *Board of Governors*, 451 F.2d 86 (8th Cir. 1971).

In the *Little Rock* case the Court determined that it was a traditional bank holding company but there were no common directors in the *Little Rock* case. Here, there are common directors and common officers and complete integration of the management of the holding company, the lead bank, and all of the affiliates.

In *Little Rock* the banks were managed by local officers but here Bancshares has moved its officers from one affiliate to another, has changed directors from one affiliate to another, and has changed officers from one affiliate to another.

In *Little Rock* each bank had its own capital surplus and undivided profits but here Bancshares will supply all the capital surplus and undivided profits for New Bank.

In *Little Rock* both the banks were supervised by different regulatory authorities but here the same regulatory authority, the Comptroller of the Currency, will supervise both Bancshares' lead bank and New Bank.

In *Little Rock* there was nothing to indicate that the holding company would be identified as one institution by the public but here Bancshares uses the same name on all of its affiliates and the same logo on all of its 31 banks; it uses unified advertising and holds all the banks out to the public as one institution (Opinion A7-A8).

In *Little Rock* the holding company was acquiring an old established bank with its own capital structure. Here, Bancshares is furnishing capital for a new bank in the same market area.

In *Billings* the court pointed out "we did not agree with the appellees that the fact that the two banks are separate corporate organizations demonstrate conclusively one is not a branch of the other. In the banking field, as elsewhere, courts have power to 'pierce the corporate veil' when the realities require it."

In *Billings* there was only one common director, here Bancshares has common officers and directors among all of its affiliates.

In *Billings* each bank had its own employees but here Bancshares moves officers, directors and employees from one affiliate to another.

In *Billings* one bank was a national and the other a state, here both are national banks, thus, under the same supervisory authority.

In *Billings* the banks had different correspondent banks but here there is only one correspondent, the anchor bank of Bancshares.

In *Billings* each bank had its own books, here one computer, through the affiliate Compac Services, Inc., keeps all the books of all affiliates. All the stationery has "Commerce Bank" on it and all have the same logo.

In *Billings* no officer or employee of the banks acted as an officer or employee of the other, here Bancshares has interlocking officers, directors and employees and has moved officers and employees from one affiliate to another affiliate.

Bancshares admitted in its Y-6 filings with the Board that it exercised supervision over the activities of its subsidiaries in investment securities and investment policies; loans and lending policies; bank premises and other fixed assets; systems and methods of operations; insurance coverage and fidelity bonds; personnel and personnel policies; pensions, profit sharing, and similar plans; dividend policies; audits; and determines fees for management services (R201, 232).

It is clear, therefore, that the uncontradicted evidence shows that Bancshares is engaged in unitary operation in violation of Missouri Branch Banking Law Section 362.105 R.S.Mo.

The Board in its Order discusses three different market areas. It defines the "relevant banking market" as the counties of Clay, Jackson, Platte and the northern half of Cass in Missouri and Johnson and Wyandotte Counties in Kansas (R436). The Board also discusses the Missouri banking market (R435) and the City of Grandview market (R437).

Grandview contends that the "relevant banking market" is Jackson County, Missouri which includes the City of Kansas City and the City of Grandview, Missouri (R436). There is no evidence in the record to support the finding of the Board that "economic and demographic considerations indicate that Jackson County is not a separate market insulated from the competitive influence of the other banks in the overall Kansas City area" (R436). The Board apparently bases its determination of the market on "previous applications" and not on any evidence in this record.

Under the definition of "relevant banking market" in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 356-361 (1963) the relevant market in this case should either be in City of Grandview, in which market New Bank has made its projections of growth and where Grandview Bank has 89 percent of its customers, or Jackson County, Missouri.

At the most, the relevant market should not exceed Jackson County, Missouri and it certainly, under any criterion, should not include the three large counties in Missouri and the two large counties in Kansas. There is absolutely no evidence in the record to show that the Board's finding of the "relevant banking market" includes these five counties.

Bancshares' anchor bank in Jackson County has a concentration of deposits exceeding 30 percent (R256) and the acquisition here would trend toward undue concentration. In fact, the evidence in the record found by the Board's

own field examiner indicated that "the acquisition would have no immediate effect on concentration, although in the long run it would serve to increase concentration and enhance applicant's position in the market in relationship to the other banking organizations" (R312).

Such a concentration is a violation of the Bank Holding Act to monopolize the business of banking in Jackson County, Missouri. *United States* v. *Phillipsburg National Bank and Trust Co.*, 399 U.S. 350 (1970).

Comptroller's Approval Withdrawn

The record before the Board indicated that the approval of the Comptroller was limited to one year after his conditional grant and to expire on January 23, 1976. The Board failed to approve the application until March 15, 1976 after the Board's record showed no extension by the Comptroller.

There is no statutory authority for the Comptroller to extend the time of opening the New Bank nor is there any statutory authority for a "Director Bank Organization and Structure Division" to extend the time of opening.

It is the Comptroller's certificate, not some "Director" of his, that is required. The extension is a nullity and the Board acted without authority.

Under 12 U.S.C. 4 only the Comptroller, or in his absence a Deputy Comptroller, could act, 41 Federal Register 36520.

Deletions in the Record

Grandview contends that if the evidence in the record is deemed insufficient for a reversal for the reasons pre-

viously stated it is because Grandview was denied due process in that Grandview could engage in no discovery (R241), nor could Grandview have a hearing where discovery could be made by deposition and cross examination under the Board rules, 12 C.F.R. 263.8.

Because of the deletions in the record (R294-6, 299-301, 303, 313, 327, 328, 429-33, 452) Grandview was denied evidence that would have been adverse to the Board's holding. The only reason it was deleted was because it was favorable to Grandview's position. There was no claim of confidentiality in those deletions.

The denial of the disclosure of the record pages R119-131 deprived Grandview of due process in that it did not have an opportunity either to show the alleged facts were in error or that there was no substantial evidence to support the Board's findings. In addition, the denial is a violation of 28 U.S.C. 2112.

The claim of confidentiality is based on the allegation that disclosure could impair public trust in Bancshares. Public trust is preserved when there is public information. Bancshares is asking the public for a public charter but refuses to allow the public to examine its operation although the Board is required under the Act to determine the financial and managerial resources of applicant (12 U.S.C. 1842). If Watergate did not demolish that argument, then no pleading by Grandview will either. The reason for the Freedom of Information Act, 5 U.S.C. 552 was to preserve public trust by piercing the veil of administrative secrecy and to open agency action to public scrutiny. *Dept. of Air Force* v. *Rose*, 74-489, April 21, 1976, ... U.S. .....

Clearly, without a hearing and full disclosure Grandview has been denied due process. *Goldberg* v. *Kelley*, 397 U.S. 254 (1970).

The deletions of the staff must be viewed in the light of the fact that the staff was all at the Kansas City Federal Reserve Bank. A director of the Reserve Bank was simultaneously the Chairman of the Board of Bancshares. The staff report was deleted while he was the director. Bancshares is the largest holding company regulated by the Reserve Bank.

This is a clear case of the regulator being the judge and jury of his own case—a classic case of conflict of interest. This, coupled with the denial of a hearing, a denial of discovery, and denial of the record, deprived Grandview of due process.

The deference of the Courts to decisions of the Board has been misplaced, and this Court should scrutinize the Board's actions more carefully.

In the Report on the Federal Reserve Reform Act, 94-1073, April 30, 1976, H.R. 12934 it is pointed out at pages 2-3 that, ". . . the need for reform of the Federal Reserve System has been evident for many years . . . control of this august body has been concentrated in the commercial banking industry to the exclusion of diverse segments of the population . . . the Committee hopes to instill a greater element of public responsibility in the workings of the Federal Reserve System, and to restore the balance between the interests of the financial community and the needs of the rest of the nation. . . ."

In the Report on the Financial Institutions Supervisory Act Amendments of 1976, 94-843, May 13, 1976, S.2304, it is pointed out on page 3, "more recently, the number of 'problem banks' has become substantial. For example, . . . at the close of 1975, national banks with assets of $249.7 billion (or 41.6 percent of all national banks) were classified by the Comptroller's office as banks which could reasonably develop into a situation urgently requiring aid either from the shareholders or otherwise . . . the go-go banking fad become a syndrome and growth for growth's sake a phenomenon and bankers conveniently by-passed prudent management practices. . . ."

The Board has presided over the go-go bankers. Bancshares is a go-go bank going from a one bank holding company to a 31 bank holding company is less than seven years (R347, 435).

Now the Board is even denying this Court a portion of the record in this case.

If discovery had been allowed, Grandview could have discovered if the testimony of Bancshares' Vice Chairman of the Board before the United States Grand Jury showed whether political contributions indicated de facto branch banking (R207); or if the creditors of Bancshares were debtors of the anchor bank and their loans to Bancshares were violations of Sec. 23A of the Federal Reserve Act (R219); or the inner workings of Bancshares as to its control of its affiliates in employment, loans, investments, real estate, systems of operation, insurance, pension and profit sharing dividends, audits, and fees.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted and the Board's Order should be reversed and Bancshares' application denied because Bancshares is engaged in illegal branch banking in Missouri and the approval of the application will be a furtherance of the banking monopoly in Jackson County, Missouri contrary to the Bank Holding Company Act, 12 U.S.C. 1842, or in the alternative, the case should be remanded to the Board for a full hearing and the Board's Order stayed until further Order of this Court.

Respectfully submitted,

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May 1977

APPENDIX

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 76-1236

Grandview Bank and Trust Co.,
Petitioner,

v.

Board of Governors of the Federal Reserve System,
Respondent,

Commerce Bancshares, Inc.,
Intervenor-Respondent.

Petition for Review of Order of the Board of Governors of the Federal Reserve System.

Submitted: November 11, 1976
Filed: March 2, 1977

Before LAY, BRIGHT and STEPHENSON, Circuit Judges.

LAY, Circuit Judge.

Petitioner, Grandview Bank and Trust Company (Grandview), seeks review of the Federal Reserve Board's approval of an acquisition of a new national bank (New Bank) in Grandview, Missouri, by Commerce Bancshares, Inc. (Bancshares). We sustain the Board's approval.

I

Bancshares was organized and incorporated under Missouri law in 1966. It became a bank holding company (BHC) in 1968 and acquired the majority of the stock of Commerce Trust Company, now Commerce Bank of Kansas City, N. A. and two subsidiaries of that bank. It now controls, in addition to other business, 31 affiliated banks in Missouri as well as Compac Services, Inc., an automated data-processing service.

On January 23, 1975, the Comptroller of the Currency granted preliminary approval to a new national bank in Grandview, Missouri. In March of 1975, Bancshares sought the Federal Reserve Board's approval for acquisition of the proposed New Bank.[1]

Notice of the application was published in the Federal Register and Grandview filed a timely protest, requesting a hearing and a stay of the processing of the application. On March 15, 1976, the Board issued an order denying petitioner's request, noting that since the Comptroller had recommended approval there was no statutory requirement that the Board hold a hearing.[2] Finding the record sufficiently complete to enable it to render a decision,[3] the Board granted the application.

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[1]Under 12 U.S.C. § 1842(a)(3) a bank holding company (BHC) must obtain approval of the Federal Reserve Board to acquire direct or indirect ownership or control of any voting shares of a bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank.

[2]*See* 12 U.S.C. § 1842(b).

[3]The Missouri director of finance had approved the application pursuant to Mo. Rev. Stat. § 362.920, and the Reserve Bank of Kansas City and the Comptroller of the Currency had submitted their memoranda recommending approval of Bancshares' application.

Pursuant to 12 U.S.C. § 1848, petitioner, Grandview, seeks a review of the Board's order. It asserts that the Board's findings on the branch banking, monopoly and financial resources issues are not supported by substantial evidence, and that the Board denied it due process by not allowing a hearing and by deleting part of the record. Bancshares' subsequent motion to intervene was granted. Grandview's motion for stay was denied.

Grandview's major contention is that Bancshares is not a traditionally recognized BHC. It claims that Bancshares' affiliates are doing business as a "unitary operation" and requests this court to "pierce the corporate veil" and find that the acquisition of New Bank would be *de facto* branch banking violative of Missouri's branch banking laws.[4] *Cf. Whitney Nat'l Bank* v. *Bank of New Orleans*, 323 F.2d 290 (5th Cir. 1963), *rev'd on other grounds*, 379 U.S. 411 (1965).

II

In approving Bancshares' application the Board found that New Bank would be a separate corporation with its own reserve requirements and capital stock and a loan limit based on such capital stock; that New Bank would have its own officers and a "generally" separate and independent board of directors; that it would maintain separate books of account, issue its own distinctive checks, and use its own stationery; that money deposited at New Bank would not

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[4]Mo. Rev. Stat. § 362.105.1(1) provides, in pertinent part, that "no bank or trust company shall maintain in this state a branch bank or trust company, or receive deposits or pay checks except in its own banking house or as provided in section 362.107 [which allows one automobile banking facility]." Since national banks are prohibited from branching if a state bank in an identical situation would be so prohibited by state law, 12 U.S.C. § 36, a national banking association in Missouri may not establish branches.

be credited to the account of a depositor at any other of Bancshares' subsidiaries nor would money deposited at another subsidiary be credited to the account of a depositor at New Bank. The Board concluded that Bancshares is a "traditionally recognized bank holding company" and that "upon consummation of the proposed acquisition, a unitary operation will not exist between Bank and any of Applicant's other banking subsidiaries."

We first review the factors considered by the Board on the branching issue.

Management.

Each of the five interim directors of New Bank is a director or officer of at least one other of Bancshares' affiliate banks, and four are officers or directors of Bancshares.

Although Bancshares conceded that these interim directors would be elected at the organizational meeting of the incorporators, it stated that upon approval of the application and subsequent granting of the charter by the Comptroller, the shareholders would elect a permanent board. Bancshares stated it "would intend that the boards of directors of [New] Bank and of Commerce Bank of Kansas City, N. A. as well as the boards of Applicant's other banks would be 'substantially separate and independent.'" Bancshares also conceded that it will fill staff openings at New Bank with people who have been trained within its system.

Grandview urges that these facts demonstrate that New Bank will not have independent management, but in fact will be controlled by Bancshares. We disagree. As the Ninth Circuit observed:

> [I]t is not enough for appellants to show that common control, through stock ownership by First Bank Stock, which participates actively in the management of its subsidiaries, produces cooperation or even eliminates competition between the subsidiaries. This is a usual, although not necessary, result of common ownership and control.

First Nat'l Bank v. *First Bank Stock Corp.*, 306 F.2d 937, 942 (9th Cir. 1962).

Capital, Surplus and Undivided Profit.

New Bank's shares will be purchased by Bancshares through use of Bancshares' own capital resources. Petitioner argues that New Bank's capital will thus be supplied by Bancshares, but we find that this is the traditional means by which a BHC acquires control of a bank.

Loan Limits.

New Bank's loan limit will be based on its own capital. However, Grandview asserts that there is a possibility of increased loan capacity through affiliated banks. Bancshares concedes that New Bank will have the use of integrated participations and liaison arrangements within the holding company system. According to Bancshares this participation arrangement within the system does not consist of an automatic participation by one affiliate bank in any and all loans which may be made by another affiliate bank and which are over that bank's lending limit. Rather, each participating loan within the system must meet stringently applied criteria and the high standards imposed by Bancshares as well as being acceptable to the participating bank. We find these transactions to be the traditional and legal means by which a BHC may work with its affiliates.

Public Identity and "De Facto" Operation.

The Board's only finding on the identity issue was that New Bank will "issue its own distinctive checks, and use its own stationery."

Bancshares urges:

> A person maintaining an account in Commerce Bank of Kansas City, N.A. or with any other bank affiliated with Applicant but not having an account with Bank would not be able to effect a deposit to or a withdrawal from such account at any office of Bank nor would the reverse situation occur. It would, of course, be possible for an ultimate withdrawal to be made by means of cashing a check at an affiliated bank other than the one where the customer would maintain his account but any check cashing privileges would be subject to the same procedures applicable in any such situation. Additionally, it is, of course, possible for an individual to present cash or its equivalent at a bank and cause the same to be wire transferred to another bank for the individual's account. While Commerce Bank of Kansas City has handled transactions of this nature a fee is charged for such wire transfers and no deposit receipt is issued to a customer by the transferring bank.

Nevertheless, petitioner is correct in its assertion that Bancshares' advertising suggests a more unitary operation. Bancshares advertizes:

> If you're a Missouri attorney who deals with Trust and Estate problems, the Commerce Bancshares family of banks bring you a new concept in estate handling. Statewide trust services that use our full team of 140 trust specialists.

> It's a fact that most small banks simply cannot justify the expense of providing adequately trained personnel to handle trust matters for their customers. So, these customers must seek help from some big city trust department where they are unknown.
>
> This is not the case with the banks in the Commerce Bancshares family. No matter how small, most Commerce banks are backed by our full team of 140 trust specialists, always ready to serve you and your clients.
>
> Take advantage of this new concept in statewide trust services. When you have a client with a trust or estate problem, call your local Commerce Bank. And put our team of 140 trust specialists to work for you.

One advertisement ends with this statement: "When you bank at Commerce you bank at an affiliate of Commerce Bancshares with assets of more than $1.5 billion."

The banking affiliates share the cost of the advertising which is controlled by a central marketing department. Each affiliate bank makes its own decision on whether to participate in a particular advertising campaign.

Grandview also urges that an automated data-processing service affiliated with Bancshares will provide automated general ledger service to New Bank as it does for all of its affiliates; thus suggesting a unitary operation. However, New Bank will maintain separate books of account and this service is permissible under the Bank Holding Company Act.[5]

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[5] 12 U.S.C. § 1843(c)(1)(C), exempts from the divestment requirements of 12 U.S.C. § 1843(a), shares of a company engaged solely in the business of its furnishing services to or performing services for a BHC or its subsidiary banks. Section 225.104 of the Code of Federal Regulations permits Bancshares' interest in Compac Services, Inc., because Compac is a separate corporation in which Bancshares owns stock. Furthermore, 12 CFR § 225.4(a)(8)(i) specifically allows a BHC to provide "bookkeeping or data processing services for the internal operations of the holding company and its subsidiaries. . . ."

Based upon this analysis we conclude that Bancshares is an existing multibank BHC seeking to acquire a newly established bank in an area where it could not branch. The commonality of directors and officers within the Bancshares system, its management training program, and its advertising all suggest a *de facto* unitary system. The Board acknowledges that "[s]ince Applicant's subsidiaries are now precluded from establishing offices in the city of Grandview proper because of Missouri's branching laws, the subject proposal represents the only means by which Applicant can extend its operations in that city."

Although we are persuaded by Grandview's argument that New Bank will have many of the attributes of a traditional branch bank, we must hold that its attack is made in the wrong forum. Although many of the operations of Bancshares appear to be "unitary," they are not in violation of the Bank Holding Company Act. *See* 12 U.S.C. §§ 1841 *et seq.*

Congress was well aware at the time of passage of the Bank Holding Company Act that many of the operations of a BHC would simulate branch banking.[6] In passing this legislation, Congress made it possible for each state to exercise a veto over BHCs in the same manner that it has passed restrictive legislation covering branch banking.[7] The State

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[6]*See generally Hearings on S. 880, S. 2350 and H.R. 6227 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 84th Cong., 1st Sess. (1955); and *Hearings on H.R. 2674 Before the House Comm. on Banking and Currency*, 84th Cong., 1st Sess. (1955).

[7]12 U.S.C. § 1846 provides:

> The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.

of Missouri allows BHC operations. *See* Mo. Rev. Stat. §§ 362.910 *et seq.*

Whether policy considerations favor adoption of BHC legislation or militate against it (by reason of the same competitive factors which restrict branch banking) is not a proper judicial concern. The argument that BHCs allow parent banks to achieve indirectly that which branch banking laws directly prohibit is not one which the courts should entertain.

As a BHC Bancshares does not conduct a direct unitary operation as where a parent sets up a branch and then operates the two offices as one bank. The facts of *Whitney, supra*, are thus distinguishable. Notwithstanding the similarity with some phases of branch banking, there is no showing that New Bank will, within the purview of 12 U.S.C. § 36(f), operate to receive deposits, pay checks or lend money on behalf of the parent bank.[8]

We acknowledged the validity of the rationale of *Whitney* in *Commercial Nat'l Bank* v. *Board of Governors*, 451 F.2d 86 (8th Cir. 1971), and stated:

> [A] banking institution cannot avoid state branch banking restrictions merely because it is organized as a holding company, if it is in fact carrying out branch banking.

451 F.2d at 89.

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[8]New Bank is a separate corporation subject to laws governing all independent banks and holding company subsidiaries. As has been pointed up, "[t]hese controls include provisions for receivership, separate liability for negligence of directors, separate loan limits, a provision making illegal investment in one subsidiary's obligations by the other or acceptance of the other's securities as collateral, and one prohibiting direct loans between subsidiaries." Comment, *Branch Banking Limitations Held Applicable to Approved Bank Holding Company Operation*, 39 N.Y.U. L.Rev. 686, 694 (1964).

Where there might exist fraud or a complete subterfuge, this test may have validity. However, more realistic is the fact that the BHC Act permits many activities similar to branch banking. Petitioner shows no adequate basis for our overturning the Board's approval merely because the identity between the holding company and the bank is not completely separate.

III

Grandview has raised other issues. It challenges the Board's finding that Bancshares' acquisition of New Bank will not result in a monopoly or have an anticompetitive effect. The Board found:

> Since Bank is a proposed new bank, consummation of the proposal would not eliminate any existing competition, nor does it appear that the proposal would have any adverse effects on potential competition.

The Federal Reserve Bank of Kansas City investigated and analyzed the application and concluded that "the entire area encompassed by its six-county market definition constitutes the relevant banking market." The Reserve Bank concluded that "Jackson County is in no way isolated or separate from the rest of . . . urbanized Kansas City. . . ." This report was part of the record before the Board.[9] There is also evidence that the Board considered and rejected Grandview's contention that Jackson County was the relevant market area. Its continued urging in this matter is no more than a disagreement with the Board's conclusion. In determining the relevant market area we must give great weight

[9] 12 CFR §§ 225.3(a) and 262.3 require that an application for approval by the Board be filed with the Federal Reserve Bank and that the Reserve Bank make such investigation as may be necessary.

to the expertise of the Board which is familiar with the competitive structure of the area involved. The evidence clearly supports the Board's findings here. *Cf. North Hills Bank* v. *Board of Governors*, 506 F.2d 623 (8th Cir. 1974).

The Board's conclusion that the acquisition would be pro-competitive is entitled to the same deference and is also supported by the record. The Board found that "[s]ince Bank is a proposed new bank, its acquisition by Applicant would not increase the concentration of banking resources in Missouri nor change Applicant's rank among banking organizations in the State." This court has determined that:

> Appellate review of a decision of the Board which is rationally based upon a full and complete record is severely limited. The Board's particular competence to determine whether a bank holding company acquisition will have substantial anticompetitive effects has been recognized by the Congress and accepted by the courts.

North Hills Bank v. *Board of Governors, supra*, 506 F.2d at 625.

Other Statutory Considerations.

Pursuant to 12 U.S.C. § 1842(c) the Board must consider "financial and managerial resources and future prospects of the company or companies and bank concerned" in determining whether to approve a BHC acquisition. Grandview contends that there was substantial evidence that Bancshares did not have financial and managerial resources necessary for approval of the application.

The record indicates that both the Reserve Bank and the Board examined Bancshares' financial position in great detail. Reserve Bank found its capital condition had re-

mained approximately the same over a number of years; none of its subsidiary banks was capital deficient; operations of these banks were satisfactory; and New Bank should become a viable bank.

The Board determined that the financial resources and future prospects of Bancshares and New Bank were "satisfactory and consistent with approval of the application." These findings are reasonable and must be sustained.

Comptroller's Withdrawn Approval.

Grandview further contends that the Comptroller's preliminary approval for the organizational charter of New Bank, granted January 23, 1975, was conditioned on the bank opening for business within one year or the preliminary approval would be withdrawn.[10] Since the Board did not approve the application until March 15, 1976, Grandview argues that the Board acted without authority and its order should be reversed.

This argument is without merit. The Board's order approving Bancshares' acquisition of New Bank was not dependent on prior charter approval of New Bank. In any event Grandview acknowledges that the Comptroller, through a subordinate, extended the required opening date.

Hearing Issue.

Grandview claims it was denied due process because there were deletions in the record, and it was not allowed discovery by depositions or a hearing.

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[10]*See* n. 1, *supra.*

We have previously rejected Grandview's deletion argument as non-meritorious.[11]

When a BHC applies to acquire a newly chartered national bank a hearing is required only if the Comptroller expresses written disapproval. 12 U.S.C. § 1842(b). In this case the Comptroller recommended approval, so the Board was not constitutionally required to hold trial-type hearings. *See Commercial Nat'l Bank* v. *Board of Governors, supra,* 451 F.2d at 90. In any event Grandview was allowed to submit a significant amount of information for the Board's consideration.

On the hearing issue this court has said:

> In connection with the request for hearing, it should also be noted that following the filing of the original application petitioner was given every opportunity to submit to the Board whatever facts, data, theory or argument it desired. Petitioner failed in this proceeding to direct attention to any facts not presented to the Board or overlooked by it. Apparently petitioner presented everything it had. We conclude that the Board gave full consideration thereto. Under such circumstances, the holding of a hearing would have been an unnecessary proceeding and would obviously have availed nothing.

Northwest Bancorporation v. *Board of Governors,* 303 F.2d 832, 844 (8th Cir. 1962).

Grandview also argues that there was a conflict of interest in that the Chairman of the Board of Bancshares was a director of the Kansas City Reserve Bank at the time

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[11]On June 3, 1976, this court denied Grandview's motions to make certain pages part of the record or available to Grandview for review.

deletions from the record were made. However, regulations would have removed the Reserve Bank's authority to approve this application and it acted only as an investigator not a decision-maker here. *See* 12 CFR § 265.2 (a) (3) (i) (a).

Since we affirm the Board's order we need not discuss the 91-day rule issue raised by Bancshares.

The order of the Federal Reserve Board is affirmed.

FEDERAL REGISTER, VOL. 41, NO. 57—
TUESDAY, MARCH 23, 1976

NOTICES

COMMERCE BANCSHARES, INC.

Order Approving Acquisition of Bank

Commerce Bancshares, Inc., Kansas City, Missouri, a bank holding company within the meaning of the Bank Holding Company Act, as applied for the Board's approval under § 3(a) (3) of the Act (12 U.S.C. 1842 (a) (3)) to acquire all of the voting shares (less directors' qualifying shares) of Commerce Bank of Grandview, N.A., Grandview, Missouri, a proposed new bank.

Notice of the application, affording no opportunity for interested persons to submit comments and views, has been given in accordance with § 3(b) of the Act. The time for filing comments and views has expired, and the Board has considered the application and all comments received, including those submitted on behalf of the Grandview Bank and Trust Company, Grandview, Missouri, and Bank of Belton, Belton,

Missouri ("Protestants"), in light of the factors set forth in § 3(c) of the Act (12 U.S.C. 1842(c)).

Applicant, the third largest banking organization in Missouri, controls 31 banks with aggregate deposits of approximately $1.2 billion, representing 8.4 percent of total deposits in commercial banks in the State. (All banking data are as of December 31, 1974, and reflect bank holding company formations and acquisitions approved by the Board through June 30, 1975.) Since Bank is a proposed new bank, its acquisition by Applicant would not increase the concentration of banking resources in Missouri nor change Applicant's rank among banking organizations in the State.

Bank is to be located near U.S. 71 in the city of Grandview, a residential community of approximately 23,000 in the south-central portion of the Kansas City market.[1] One of the protestants, (Grandview Bank and Trust Company) is the only bank presently located in Grandview. Applicant is the largest banking organization in the relevant market with five of its subsidiary banks holding 13.9 percent of the deposits in the market; however, it does not appear that Applicant holds a dominant position in the market. The second and third largest banking organizations in the market are of comparabie size to Applicant, and the market also includes subsidiaries of some of the State's largest banking organizations. Since Bank is a proposed new bank, consummation of the proposal would not eliminate any existing competition, nor does it appear that the proposal would

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[1]The relevant banking market is approximated by Clay, Jackson, and Platte Counties and the northern half of Cass County, Missouri, and Johnson and Wyandotte Counties in Kansas. Protestants have urged that the relevant market is Jackson County; however, economic and demographic considerations indicate that Jackson County is not a separate market insulated from the competitive influence of the other banks in the overall Kansas City area. Accordingly, the Board concludes that the relevant market is as hereinbefore described.

have adverse effects on potential competition. Since Applicant's subsidiaries are now precluded from establishing offices in the city of Grandview proper because of Missouri's branching laws, the subject proposal represents the only means by which Applicant can extend its operations in that city. Moreover, it appears that the proposal may increase competition in this area through the introduction of another competitor. Accordingly, on the basis of the facts of record, the Board concludes that consummation of the proposal would not have significant adverse effects on existing or potential competition and that competitive considerations are consistent with approval of the application.

The financial and managerial resources and future prospects of Applicant and its subsidiary banks are regarded as satisfactory and consistent with approval of the application. Similarly, the financial and managerial resources and future prospects of Bank as a subsidiary of Applicant are satisfactory and consistent with approval of the application. Since Grandview is located in the Kansas City market, the residents of the area have a full range of banking services available to them from the banks in that market. However, as noted above, there is only one bank located in Grandview at the present time. Thus, consummation of this proposal would benefit the convenience and needs of the area by introducing an alternative source of a full range of banking services. The Board regards such a factor as lending weight toward approval of the application.

In its review of the subject application, the Board has given careful consideration to the comments submitted on behalf of Protestants, two banks that are located near the proposed site of Bank. In addition to requesting a hearing on the application and a delay in the processing, which re-

quests the Board has denied,[2] Protestants contend, *inter alia*, that Bank's proposed affiliation with Applicant would offend Missouri law prohibiting branch banking, R.S.Mo. § 362.105 (1). The facts of record indicate that Bank will be a separate corporation, with its own reserve requirements and capital stock and a loan limit based on such capital stock; that Bank will be managed by its own officers; that Bank's board of directors will be generally separate and independent from the Boards of Applicant and of Applicant's subsidiaries; and that Bank will maintain its own separate books of account,[3] issue its own distinctive checks, and use its own stationery. Applicant further states that Bank will be managed by its own local officers and that money deposited at Bank will not be credited to the account of a depositor at any other banking subsidiary of Applicant and, conversely, any money deposited at any other banking subsidiary of Applicant will not be credited to the account of a depositor at Bank.

The Board concludes, based upon the above and other facts of record, that Applicant is a "traditionally recognized bank holding company which, with its own capital, invests

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[2]Protestants requested that the Board hold a hearing on the application and that the Board delay acting on the application until a suit which Protestant, Grandview Bank and Trust Company, has filed against the Comptroller of the Currency is resolved. Under § 3(b) of the Act, the Board is required to hold a hearing when the primary supervisor of the Bank to be acquired recommends disapproval of the application (12 U.S.C. 1842(b)). In this case, after a hearing on the charter application, the Comptroller of the Currency issued preliminary charter approval to Bank on January 23, 1975, and he has not subsequently recommended that the subject application be denied. Thus, there is no statutory requirement that the Board hold a hearing. In view of the Board's conclusion that the record in this case is sufficiently complete to render a decision, the Board has denied Protestant's request for a hearing and a continuance pending resolution of Protestant's action versus the Comptroller of the Currency.

[3]Applicant states, however, that one of its affiliates, Compac Services, Inc., may provide automated general ledger service to Bank.

in or buys the stock of banks," *Whitney National Bank* v. *Bank of New Orleans*, 323 F. 2d 290 (D.C. Cir. 1963), *rev'd on other grounds*, 379 U.S. 411 (1965), and that, upon consummation of the proposed acquisition, a unitary operation will not exist between Bank and any of Applicant's other banking subsidiaries.

In view of the foregoing discussion and having considered the facts of record and all the comments of Protestants in light of the statutory factors the Board must consider under § 3(c) of the Act, it is the Board's judgment that consummation of the subject proposal would be in the public interest and that the application to acquire Bank should be approved.

Accordingly, on the basis of the record, the application is approved for the reasons summarized above. The transaction shall not be made (a) before the thirtieth calendar day following the effective date of this Order or (b) later than three months after that date, and (c) Commerce Bank of Grandview, N.A., Grandview, Missouri, shall be opened for business not later than six months after the effective date of this Order. Each of the periods described in (b) and (c) may be extended for good cause by the Board, or by the Federal Reserve Bank of Kansas City pursuant to delegated authority.

By order of the Board of Governors, effective March 15, 1976.

J. P. Garbarini

Assistant Secretary of the Board.

[FR Doc.76-8181 Filed 3-22-76; 8:45 am]

R.S. Mo. §362.105(1) provides, as here pertinent, that:

362.105. Powers and authority of banks and trust companies.—1. Every bank and trust company created under the laws of this state may:

(1) Conduct the business of receiving money on deposit and allowing interest thereon not exceeding the legal rate or without allowing interest thereon, and of buying and selling exchange, gold, silver, coin of all kinds, uncurrent money, of loaning money upon real estate or personal property, and upon collateral of personal security at a rate of interest not exceeding that allowed by law, and also of buying, investing in, selling and discounting negotiable and nonnegotiable paper of all kinds, including bonds as well as all kinds of commercial paper; and for all loans and discounts made, the corporation may receive and retain the interest in advance; provided, however, that no bank or trust company shall maintain in this state a branch bank or trust company, or receive deposits or pay checks except in its own banking house or as provided in section 362.107;

362.107. Banking facilities separate from banking house, limitations.—1. Any other law of this state to the contrary notwithstanding, every bank and every trust company organized under the laws of this state which has the corporate power to receive deposits may, upon compliance with this section, maintain and operate separate and apart from its banking house facilities for drive-in or walk-up service, where only checks may be paid, deposits received, deposits withdrawn, change made, exchange made, bank money orders issued, safe deposit boxes maintained and rented and loan payments received.

2. No such bank or trust company may maintain or operate:

(1) More than two such facilities separate and apart from its banking house at the same time excepting facilities required by the United States government to be maintained by it as financial agent of the government on government reservations solely for military and other government personnel, but nothing in this section shall be construed to authorize any bank or trust company organized under the laws of this state to establish or maintain such facilities as financial agent of the government on government reservations; or

(2) Such a facility outside the limits of the city, town or village or unincorporated community in which its banking house is located nor outside the county in which the bank or trust company's banking house is located, even if the limits of such city, town, village or unincorporated community extend across county lines, except as otherwise provided by law; or

(3) Such facility located closer than four hundred feet to the main banking house of another then existing banking institution unless such facility is located closer to the main banking house of the banking institution operating the facility than it is to the main banking house of any other then existing banking institution, or unless the banking institutions affected consent thereto in writing; or

(4) Such facility separate and part from its banking house without having first obtained the approval of the director of finance of the state of Missouri.

3. Whenever any such bank or trust company desires to maintain and operate a facility separate and apart from its banking house, pursuant to this section, or to move a facility previously established under this section to another location, it shall apply to the director of finance for such authority and provide the director with such relevant information as he may reasonably request. In determining whether or not to approve the application for the facility, the director shall take into consideration the following facts:

(1) The convenience, needs and welfare of the people of the community and area served;

(2) The financial strength of the banking institution making application for the facility in relation to the cost of establishing and maintaining the facility;

(3) Whether other banking institutions will be seriously injured by the approval of the application for the facility at the location specified.

4. If the director of finance is not satisfied and denies the application, the action of the director in granting or denying any such application may be appealed from and be reviewed in the same manner as action by him pursuant to section 362.040 may be appealed from the reviewed.

5. Nothing contained in this section shall be deemed to authorize the maintenance or operation of a branch bank or a branch trust company in contravention of the prohibition contained in section 362.105.

6. National banking associations located in this state have the same but no greater right under or by virtue of this section as banks and trust companies organized under the laws of this state.

(L. 1959 H. B. 568 §§ 1, 2, A. L. 1971 S. B. 146, A. L. 1972 H. B. 1962)

362.915. Limitation on bank holding company—total deposits, how computed.—It is unlawful for any bank holding company to obtain control of any bank if the total deposits in the bank together with the total deposits in all banks in Missouri controlled by the bank holding company exceed thirteen percent of the total bank deposits in all banks in the state, determined as of the date of the last simultaneous request for reports of condition issued by the Federal Deposit Insurance Corporation, the Comptroller of the Currency and the director of finance of the state of Missouri, for which totals are available, preceding the date the bank holding company files an application with the division of finance as required by sections 362.910 to 362.940, except that the reports at mid-year and year end shall not be used for such purpose. In computing the total bank deposits in all banks controlled by the bank holding company and the bank which the holding company seeks to acquire, there shall be deducted from total deposits, certificates of deposit in the face amount of one hundred thousand dollars or more, deposits from sources outside the United States, and deposits of banks other than banks controlled by the bank holding company.

(L. 1974 H. B. 1798 subsection 2 of § 1)

Effective 1-1-75

362.920. Procedure to obtain order allowing acquisition —duty of director.—1. A bank holding company which seeks to acquire control of a bank or a bank holding company shall file with the division of finance a copy of any application which the bank holding company is required to file with the Board of Governors of the Federal Reserve System, together with such supplemental data as will enable the director of finance to determine if the acquisition is lawful under

the provisions of section 362.915. The director of finance shall, within thirty days after receiving the application, issue his order declaring the acquisition to be lawful or unlawful under the provisions of section 362.915. The order of the director shall be the final administrative decision which may be appealed in the circuit court or court of common pleas of the county of proper venue within thirty days after the mailing or delivery of notice of the director's order, by any party aggrieved by the order.

2. The director shall also determine if the proposed acquisition of a bank by a bank holding company is consistent with the interests of promoting and maintaining a sound banking system and sound trust companies, the security of deposits and depositors and other customers, the preservation of the liquid position of banks and in the interest of preventing injurious credit expansions and contractions. If the director determines that the proposed acquisition is not consistent with those objectives, he shall within thirty days of receipt of the application, communicate his objections to the proposed acquisition to the Board of Governors of the Federal Reserve System.

3. The provisions of section 362.915 and subsections 1 and 2 of this section shall not apply in the case of the acquisition of a bank or bank holding company acquired at the request of the director of finance, the Federal Deposit Insurance Corporation or the Board of Governors of the Federal Reserve System in order to prevent the imminent failure of a bank.

(L. 1974 H. B. 1798 subsections 3 and 4 of § 1)

Effective 1-1-75

Tit. 12, § 36

36. Branch banks.—The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

(a) A national banking association may retain and operate such branch or branches as it may have had in lawful operation at the date of the approval of this Act [Feb. 25, 1927], and any national banking association which continuously maintained and operated not more than one branch for a period of more than twenty-five years immediately preceding the approval of this Act [Feb. 25, 1927] may continue to maintain and operate such branch.

(b) (1) A national bank resulting from the conversion of a State bank may retain and operate as a branch any office which was a branch of the State bank immediately prior to conversion if such office—

(A) might be established under subsection (c) of this section as a new branch of the resulting national bank, and is approved by the Comptroller of the Currency for continued operation as a branch of the resulting national bank;

(B) was a branch of any bank on February 25, 1927; or

(C) is approved by the Comptroller of the Currency for continued operation as a branch of the resulting national bank.

The Comptroller of the Currency may not grant approval under clause (C) of this paragraph if a State bank (in a situation identical to that of the national bank) resulting from the conversion of a national bank would be prohibited

by the law of such State from retaining and operating as a branch an identically situated office which was a branch of the national bank immediately prior to conversion.

(2) A national bank (referred to in this paragraph as the "resulting bank"), resulting from the consolidation of a national bank (referred to in this paragraph as the "national bank") under whose charter the consolidation is effected with another bank or banks, may retain and operate as a branch any office which, immediately prior to such consolidation, was in operation as—

(A) a main office or branch office of any bank (other than the national bank) participating in the consolidation if, under subsection (c) of this section, it might be established as a new branch of the resulting bank, and if the Comptroller of the Currency approves of its continued operation after the consolidation;

(B) a branch of any bank participating in the consolidation, and which, on February 25, 1927, was in operation as a branch of any bank; or

(C) a branch of the national bank and which, on February 25, 1927, was not in operation as a branch of any bank, if the Comptroller of the Currency approves of its continued operation after the consolidation.

The Comptroller of the Currency may not grant approval under clause (C) of this paragraph if a State bank (in a situation identical to that of the resulting national bank) resulting from the consolidation into a State bank of another bank or banks would be prohibited by the law of such State from retaining and operating as a branch an identically situated office which was a branch of the State bank immediately prior to consolidation.

(3) As used in this subsection, the term "consolidation" includes a merger.

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within the limits of the county in which the main office of such association is located, for the purpose of receiving and paying out deposits, issuing and cashing checks and drafts, and doing business incident thereto: Provided, That any permit issued under this sentence shall be revoked upon the opening of a State or national bank in such community. Except as provided in the immediately preceding sentence, no such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a combined capital stock and surplus equal to the combined amount of

capital stock and surplus, if any, required by the law of the State in which such association is situated for the establishment of such branches by State banks, or, if the law of such State requires only a minimum capital stock for the establishment of such branches by State banks, unless such association has not less than an equal amount of capital stock.

(d) The aggregate capital of every national banking association and its branches shall at no time be less than the aggregate minimum capital required by law for the establishment of an equal number of national banking associations situated in the various places where such association and its branches are situated.

(e) No branch of any national banking association shall be established or moved from one location to another without first obtaining the consent and approval of the Comptroller of the Currency.

(f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

(g) This section shall not be construed to amend or repeal section 25 of the Federal Reserve Act, as amended, [§§ 601-604 of this title], authorizing the establishment by national banking associations of branches in foreign countries, or dependencies, or insular possessions of the United States.

(h) The words "state bank," "state banks," "bank," or "banks," as used in this section, shall be held to include trust companies, savings banks, or other such corporations

or institutions carrying on the banking business under the authority of state laws. (R.S. § 5155; Feb. 25, 1927, c. 191, § 7, 44 Stat. 1228; June 16, 1933, c. 89, § 23, 48 Stat. 189, 190; Aug. 23, 1935, c. 614, Title III, § 305, 49 Stat. 708; July 15, 1952, c. 753, § 2(b), 66 Stat. 633; Sept. 28, 1962, P. L. 87-721, 76 Stat. 667.)

12 U.S.C. §1848 provides:

Any party aggrieved by an order of the Board under this Act may obtain a review of such order in the United States Court of Appeals within any circuit wherein such party has its principal place of business, or in the Court of Appeals in the District of Columbia, by filing in the court, within thirty days after the entry of the Board's order, a petition praying that the order of the Board be set aside. A copy of such petition shall be forthwith transmitted to the Board by the clerk of the court, and thereupon the Board shall file in the court the record made before the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition the court shall have jurisdiction to affirm, set aside, or modify the order of the Board and to require the Board to take such action with regard to the matter under review as the court deems proper. The findings of the Board as to the facts, if supported by substantial evidence, shall be conclusive.

12 U.S.C. §1850 provides:

With respect to any proceeding before the Federal Reserve Board wherein an applicant seeks authority to acquire a subsidiary which is a bank under section 3 of the Bank Holding Company Act of 1956, to engage directly or indirectly in a nonbanking activity pursuant to section 4 of such Act, or to engage in an activity otherwise prohibited under section

106 of this Act, a party who would become a competitor of the applicant or subsidiary thereof by virtue of the applicant's or its subsidiary's acquisition, entry into the business involved, or activity, shall have the right to be a party in interest in the proceeding and, in the event of an adverse order of the Board, shall have the right as an aggrieved party to obtain judicial review thereof as provided in section 9 of such Act of 1956 or as otherwise provided by law.

12 U.S.C. §1842(a) provides:

It shall be unlawful, except with the prior approval of the Board, (1) for any action to be taken that causes any company to become a bank holding company; (2) for any action to be taken that causes a bank to become a subsidiary of a bank holding company; (3) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank; (4) for any bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank; or (5) for any bank holding company to merge or consolidate with any other bank holding company. Notwithstanding the foregoing this prohibition shall not apply to (A) shares acquired by a bank, (i) in good faith in a fiduciary capacity, except where such shares are held under a trust that constitutes a company as defined in section 2(b) and except as provided in paragraphs (2) and (3) of section 2(g), or (ii) in the regular course of securing or collecting a debt previously contracted in good faith, but any shares acquired after the date of enactment of this Act in securing or collecting any such previously contracted debt shall be disposed of within a period of two

years from the date on which they were acquired; or (B) additional shares acquired by a bank holding company in a bank in which such bank holding company owned or controlled a majority of the voting shares prior to such acquisition. For the purpose of the preceding sentence, bank shares acquired after the date of enactment of the Bank Holding Company Act Amendments of 1970 shall not be deemed to have been acquired in good faith in a fiduciary capacity if the acquiring bank or company has sole discretionary authority to exercise voting rights with respect thereto, but in such instances acquisitions may be made without prior approval of the Board if the Board, upon application filed within ninety days after the shares are acquired, approves retention or, if retention is disapproved, the acquiring bank disposes of the shares or its sole discretionary voting rights within two years after issuance of the order of disapproval.

12 U.S.C. §1842(b) provides:

Upon receiving from a company any application for approval under this section, the Board shall give notice to the Comptroller of the Currency, if the applicant company or any bank the voting shares or assets of which are sought to be acquired is a national banking association or a District bank, or to the appropriate supervisory authority of the interested State, if the applicant company or any bank the voting shares or assets of which are sought to be acquired is a State bank, and shall allow thirty days within which the views and recommendations of the Comptroller of the Currency or the State supervisory authority, as the case may be, may be submitted. If the Comptroller of the Currency or the State supervisory authority so notified by the Board disapproves the application in writing within said thirty days, the Board shall forthwith give written notice

of that fact to the applicant. Within three days after giving such notice to the applicant, the Board shall notify in writing the applicant and the disapproving authority of the date for commencement of a hearing by it on such application. Any such hearing shall be commenced not less than ten nor more than thirty days after the Board has given written notice to the applicant of the action of the disapproving authority. The length of any such hearing shall be determined by the Board, but it shall afford all interested parties a reasonable opportunity to testify at such hearing. At the conclusion thereof, the Board shall by order grant or deny the application on the basis of the record made at such hearing. In the event of the failure of the Board to act on any application for approval under this section within the ninety-one-day period which begins on the date of submission to the Board of the complete record on that application, the application shall be deemed to have been granted.

12 U.S.C. §1842(c) provides:

The Board shall not approve—

(1) any acquisition or merger or consolidation under this section which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

(2) any other proposed acquisition or merger or consolidation under this section whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless

it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

In every case, the Board shall take into consideration the financial and managerial resources and future prospects of the company or companies and the banks concerned, and the convenience and needs of the community to be served.

12 U.S.C. §1943(a) provides in pertinent part:

Except as otherwise provided in this Act, no bank holding company shall—

(1) after the date of enactment of this Act acquire direct or indirect ownership or control of any voting shares of any company which is not a bank, or

(2) after two years from the date as of which it becomes a bank holding company, or in the case of a company which has been continuously affiliated since May 15, 1955, with a company which was registered under the Investment Company Act of 1940, prior to May 15, 1955, in such a manner as to constitute an affiliated company within the meaning of that Act, after December 31, 1978, or in the case of any company which becomes, as a result of the enactment of the Bank Holding Company Act Amendments of 1970, a bank holding company on the date of such enactment, after December 31, 1980, retain direct or indirect ownership or control of any voting shares of any company which is not a bank or bank holding company or engage in any activities other than (A) those of banking or of managing or controlling banks and other subsidiaries authorized under this Act or of furnishing services to or performing services for its subsidiaries, and (B) those permitted under paragraph (8) of subsection (c) of this section subject to all the conditions specified in such paragraph or in any order or regulation issued by the Board under such paragraph:

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1554

GRANDVIEW BANK AND TRUST COMPANY,
Petitioner,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

and

COMMERCE BANCSHARES, INC.,
Respondents.

BRIEF FOR RESPONDENT COMMERCE BANCSHARES, INC. IN OPPOSITION

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IN THE

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OCTOBER TERM, 1976

No. 76-1554

GRANDVIEW BANK AND TRUST COMPANY,
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v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

and

COMMERCE BANCSHARES, INC.,
Respondents.

BRIEF FOR RESPONDENT COMMERCE BANCSHARES, INC. IN OPPOSITION

Respondent Commerce Bancshares, Inc. ("Bancshares") opposes the petition for a writ of certiorari filed in this matter.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 550 F. 2d 415 (1977) and is set forth at pp. A1 to A14 of the Appendix to the Petition. The Order of the Board of Governors of the Federal Reserve System ("the Board") is reported at 41 Fed. Reg. 12093 (1976) and is set forth at pp. A14 to A18 of the appendix to the petition.

JURISDICTION

The grounds on which this Court's jurisdiction is invoked are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Whether the court below was correct in affirming the Board's determination that, as a bank holding company seeking to make a new entry through acquisition of a newly chartered bank, approval of Bancshares' application to acquire the New Bank (a) was not barred by the branch-banking laws of Missouri, and (b) was favored by competitive considerations.

2. Whether the Court of Appeals was correct in its determination that the Board acted within its discretion in denying petitioner's request for a hearing, and that the procedures employed by the Board were otherwise free of prejudice to petitioner.

3. Whether the Board's failure to act on Bancshares' application within the period authorized by law, coupled with the statutory provision that, upon such failure, "the application shall be deemed to have been granted," provides an alternative basis for the challenged acquisition which renders moot petitioner's complaints concerning the affirmation by the court below of the Board's approval Order.

STATUTES INVOLVED

The statutes involved in this case, the full text of which are set forth in an appendix to this Brief in Opposition, are cited below:

12 U.S.C. §§ 1842(a), (b) and (c)
12 U.S.C. § 1848
R.S. Mo. § 362.105(1)
R.S. Mo. §§ 362.915, 362.920

STATEMENT OF THE CASE

This litigation arises out of the Board's approval, issued under provisions of the federal Bank Holding Company Act, of an application of Bancshares to acquire substantially all of the voting stock of a new national bank ("the New Bank"). The New Bank had been organized as a proposed subsidiary of Bancshares to provide an alternative source of banking services in the City Grandview, an incorporated community lying in the southeastern portion of the Kansas City Metropolitan Area; prior to the time the New Bank commenced operations, petitioner was the only bank located in Grandview (R. 43, 327).[1]

Bancshares is a bank holding company which was organized in 1966 and now controls 31 banks located in Missouri (R. 297, 435). On January 23, 1975 the Comptroller of the Currency of the United States ("Comptroller") gave his preliminary approval to an application seeking authority to organize the New Bank; this approval was conditioned on, *inter alia*, the requirement that Bancshares would hold all of the bank's stock with the exception of directors' qualifying shares (R. 10, 11). On March 5, 1975, Bancshares filed an application with the Federal Reserve Bank of Kansas City ("Reserve Bank") seeking authority, pursuant to § 3(a)(3) of the Bank Holding Company Act (12 U.S.C. § 1842) to acquire substantially all of the voting stock of the New Bank (R. 1).

After obtaining from Bancshares certain additional information it believed necessary to clarify the application, on April 15, 1975, the Reserve Bank transmitted copies thereof to the Comptroller, the Assistant Attorney General of the United States (Antitrust Division), the

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[1] References to the record below (which consisted of the administrative record compiled before the Board) are cited "R. " herein.

Commissioner of Finance, State of Missouri, and the Federal Deposit Insurance Corporation (R. 244 to R. 247); in addition, the Reserve Bank forwarded the application to the Board, indicating that, in its opinion, the application was "complete and ready for consideration by the Board" (R. 242). On May 15, 1975, the Commissioner of Finance, who is charged by law with responsibility for the execution of Missouri's banking statutes (R.S. Mo. § 361.010, *et seq.*), advised the Board that Bancshares' application was lawful under the Missouri Bank Holding Company Act (R. 290, 291); and on July 8, 1975, the Comptroller recommended approval of the application as in the public interest, noting specifically the absence of adverse competitive effects and predicting that "[c]ompetition in the Grandview area will be stimulated by the presence of an additional banking alternative" (R. 378, 379). No comments pertinent to Bancshares' application were received from the Assistant Attorney General or the Federal Deposit Insurance Corporation.

Notice of Bancshares' application was published in the Federal Register on May 1, 1975, offering the public an opportunity to inspect the application and submit written comments thereon "to be received [by the Board] not later than May 27, 1975" (R. 248). In numerous submissions made before, during and after the period prescribed for public comment, the petitioner[2] urged the Board to deny Bancshares' application on the grounds *inter alia* that (a) the acquisition would have anticompetitive effects not clearly outweighed in the public interest by any effect in meeting the convenience and needs

[2] In addition, the Bank of Belton, in two letters filed four months after expiration of the comment period, urged that the application be denied for the reasons advanced by petitioner (R. 386, 387, 403, 404). Bank of Belton's subsequent untimely Motion to Intervene in the review proceedings was denied by the Court of Appeals on September 2, 1976.

of the community; (b) the financial and managerial resources and future prospects of Bancshares were questionable; (c) the banking needs of the Grandview community were adequately served without the New Bank; and (d) the acquisition would violate Missouri's branch-banking law because the New Bank would be a sham corporation which would operate in unitary fashion with Bancshares' lead bank (R. 250 to 280). In addition, petitioner moved for an indefinite stay of the administrative proceedings and requested a hearing with the opportunity to employ discovery procedures; however, when pressed by the Board to explain why a written presentation would not suffice in lieu of a formal hearing, petitioner's response stated that, through the discovery procedures thought to be associated with a hearing, it hoped to discover evidence to substantiate its charges of unlawful "unitary operations" in violation of the branch-banking laws (R. 365, 374, 375).

As required by the Board's regulations, the Reserve Bank investigated Bancshares' application and, in a lengthy analysis thereof filed with the Board, rejected petitioner's arguments that the New Bank would operate in violation of the branch-banking laws or have anti-competitive effects (R. 311, 312, 326). Instead, the report concludes that the acquisition "could favorably affect competition in the Grandview area," and makes favorable findings regarding the financial condition, managerial resources and future prospects of Bancshares and the New Bank (R. 297-301).

On March 15, 1976—nine months after expiration of the period it set for public comment and eight months after its receipt of the Comptroller's advisory views—the Board issued its unanimous Order approving Bancshares' application, and denying petitioner's requests for a hearing and an indefinite stay (R. 434 to R. 440). Addressing competitive considerations, the Board found that the

acquisition would "not have significant adverse effects on existing or potential competition;" rather, noting that the application related to a proposed new entry, the Board foresaw increased "competition in this area through the introduction of another competitor" (R. 437). Favorable findings were made with respect to the financial and managerial resources and prospects of Bancshares and the New Bank (R. 437). Taking note of the fact that petitioner was the only bank then operating in Grandview, the Board determined that the proposed acquisition "would benefit the convenience and needs of the area by introducing an alternative source of a full range of banking services" (R. 437). Finally, turning to petitioner's claim that the acquisition would violate the branch-banking laws of Missouri, the Board found (R. 438, 439):

> The facts of record indicate that Bank will be a separate corporation, with its own reserve requirements and capital stock and a loan limit based on such capital stock; that Bank will be managed by its own officers; that Bank's board of directors will be generally separate and independent from the board of Applicant and of Applicant's subsidiaries; and that Bank will issue its own distinctive checks, and use its own stationery. Applicant further states that Bank will be managed by its own local officers and that money deposited at Bank will not be credited to the account of a depositor at any other banking subsidiary of Applicant and, conversely, any money deposited at any other banking subsidiary of Applicant will not be credited to the account of a depositor at Bank. (Footnote omitted.)

Based upon these facts, the Board concluded that "upon consummation of the proposed acquisition, a unitary operation will not exist between Bank and any of Applicant's other banking subsidiaries" (R. 439). Bancshares' application was, accordingly, approved as in the "public interest" (R. 440).

On or about March 23, 1976, petitioner initiated proceedings in the Eighth Circuit to review the Board's Order. By Order dated April 15, 1976, the Court of Appeals denied petitioner's motion for stay pending review. On July 14, 1976 Bancshares effected the acquisition, and the New Bank, having received from the Comptroller final authority to commence business, opened its doors to the public. On March 2, 1977, the Court of Appeals issued its unanimous opinion affirming the Board's Order in all respects and entered judgment accordingly. *Grandview Bank & Trust* v. *Board of Governors*, 550 F. 2d 415 (8th Cir. 1977).

ARGUMENT

Petitioner argues here, as it did without success before the Court of Appeals and the Board, that the Missouri statute which prohibits a bank from establishing branches also precludes Bancshares from expansion through the acquisition of the New Bank. Although it acknowledges the existence of legislation at both the federal and state levels which permits bank holding companies in Missouri to acquire control of banks and thereafter operate them as subsidiaries, petitioner nonetheless contends, relying on the District of Columbia Circuit's opinion in *Whitney National Bank* v. *The Bank of New Orleans*, 323 F. 2d 290 (D.C. Cir. 1963), *rev'd on other grounds*, 379 U.S. 411 (1965), that the separate incorporation of the New Bank should be disregarded and Bancshares (or its lead bank) found to be engaged in unlawful branch-banking through the New Bank.

In addition, petitioner argues that the court below erred in supporting the Board's determination that the "relevant banking market," in which the competitive effects of Bancshares' new entry should be measured, is a six-county area rather than Jackson County alone as contended by petitioner. Finally, petitioner urges that the Court of Appeals erred in rejecting its contention that the Board's procedures were constitutionally defective.

Bancshares respectfully submits that there is absolutely no merit to any of these arguments, many of which are based on misstatements of the record, or an unsupported assertions made by petitioner to the Board;[3] that the Board's Order and the decision of the unanimous panel of the Court of Appeals sustaining it are manifestly correct and in accord with settled principles of law; and that none of the considerations governing review by this Court on writ of certiorari are present. Moreover, the failure of the Board to act upon Bancshares' application within the period authorized by law, coupled with the statutory provision that upon such failure "the application shall be deemed to have been granted", provides alternative grounds to sustain Bancshares' acquisition of the New Bank, and renders moot petitioner's challenge to the Board's Order, making this case a most inappropriate vehicle for consideration of the federal questions petitioner alleges to be involved in that challenge. The petition should, accordingly, be denied for this additional reason.

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[3] Apparently unwilling or unable to be instructed by the record or the court below, petitioner repeats many of the frivolous arguments which were rejected at earlier stages of the administrative and judicial process. Thus, while the petition asserts that "Bancshares holds itself out as a bank" because of the composition of its financial statements (Pet. 21), a review of petitioner's supporting record references (R. 15, 16) reveals that they are to Bancshares' "Consolidated" financial statements, which are required by generally accepted accounting principles to record certain of the assets and liabilities of its subsidiary banks; Bancshares' financial statements, prepared on the "Parent Company Only" basis do not (R. 13, 17). Later, in connection with its argument that the Board's procedures were defective, and in an apparent attempt to attach some relevance to the service of a Bancshares' official as a director of the Reserve Bank, petitioner asserts that the deletions it complains of in the record were made by the Reserve Bank (Pet. 27); in fact, the Certification to the record filed with the court below indicates that the Board's staff in Washington, D.C., determined which materials should, consistent with the Board's regulations and other provisions of federal law, be deleted.

I. THE PETITION PRESENTS NO QUESTIONS WARRANTING REVIEW BY THIS COURT

In establishing a procedure for judicial review of the Board's orders under the Bank Holding Company Act, Congress provided that "[t]he findings of the Board as to the facts, if supported by substantial evidence, shall be conclusive." 12 U.S.C. § 1848. The court below correctly determined that substantial evidence in the more than 400-page administrative record supports the Board's findings; that the Board's conclusions were rational; and that the Board's procedures were fair to petitioner. The petition presents no basis to justify a further review of these patently sound determinations.

A. The Branch-Banking Issue

The federal Bank Holding Company Act permits a bank holding company such as Bancshares, upon obtaining the prior approval of the Board,[4] to acquire control of additional banks. 12 U.S.C. § 1842(a) and (b). One provision of this statute reserves to each State "such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies and subsidiaries thereof." 12 U.S.C. § 1846. Acting pursuant to the authority thus reserved to them, some States have prohibited a company from acquiring control of any, or of more than one bank.[5] However,

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[4] The statute prescribes one additional means by which a bank holding company can obtain such authority: it provides that, upon the failure of the Board to act upon such an application within the 91-day period prescribed by statute, "the application shall be deemed to have been granted." 12 U.S.C. § 1842(b). In Section II of this Brief, Bancshares will explain why it believes that this provision renders moot the issues petitioner seeks to have this Court review.

[5] The Louisiana statute discussed by this Court in its decision in *Whitney National Bank, supra.*, 379 U.S. at 414, contains such a prohibition. La. Rev. Stat. § 6.1003.

the State of Missouri has enacted legislation which specifically permits bank holding companies to obtain control of additional banks, subject to certain regulatory provisions, including the requirement that the acquisition be declared lawful by the Commissioner of Finance. R.S. Mo. §§ 362.915, 362.920. On the other hand, the State of Missouri prohibits banks from establishing branches[6] (R.S. Mo. § 362.105(i)); and this provision is incorporated by federal law (12 U.S.C. § 36(c)), with the result that national banks in Missouri are subject to the same prohibition. *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122, 133 (1969). One result of these divergent statutory provisions is that a bank holding company in Missouri—as well as in other states with similar banking statutes—may (with Board approval) acquire control of separately organized banks located at various points throughout the State, although a single bank would be unable to establish branches at such locations.

The Court below comprehended this statutory scheme, and, although the record before it disclosed extensive administrative scrutiny of the branch-banking question,[7] it nonetheless conducted its own analysis of the eviden-

[6] However, the laws of Missouri do permit a bank to establish "one facility for drive-in and walk-up service" within 1,000 feet of its main banking house. R.S. Mo. § 362.107.

[7] In its application to the Board, Bancshares made a full factual presentation concerning the manner in which the New Bank would operate as a separately organized subsidiary (R. 95-98). The Reserve Bank's investigation of Bancshares' application included a lengthy analysis of the branch-banking question raised by petitioner, upon the basis of which the Reserve Bank reported to the Board that no violation of such laws would result from Bancshares' acquisition of the New Bank (R. 311, 312). When Bancshares' application reached the Board in Washington, yet another investigation was initiated into the issue raised by petitioner, with the facts thus elicited providing additional support for the Board's determination that no violation of the branch-banking laws would occur as a result of the acquisition (R. 329, 330, 344-347).

tiary support for the findings upon which the Board's favorable conclusion is based. *Grandview Bank & Trust*, *supra.*, 550 F. 2d at 518, 519. Thus, the court determined that the New Bank would have its own separate capital structure as the result of the purchase by Bancshares of its shares; and, disagreeing with petitioner, the court found this to be the "traditional means by which a [bank holding company] acquires control of a bank." Noting that the record indicated that the Board of Directors of the New Bank would be "substantially separate and independent" of Banschares' other subsidiary banks, the court ruled that such commonality of management as might exist was a "usual, although not necessary, result of common ownership and control." The New Bank was determined to have its own loan limits, with the possibility of increased loan capacity through participation arrangements with affiliated banks; such transactions were found to be "the traditional and legal means by which a [bank holding company] may work with its affiliates." The court took note of the evidence indicating that the New Bank would have its own public identity and would not be used as the conduit through which an affiliated bank would conduct operations in Grandview; and the automated general ledger service provided by Bancshares to all its affiliated banks was found to be permissable under the Bank Holding Company Act and regulations published thereunder. Based upon this review of the record, the Court of Appeals affirmed the Board's determination that the transaction represented the attempt of an "existing multi-bank [holding company] seeking to acquire a newly established bank" which would not therefore, result in a violation of the branch-banking laws. This conclusion makes obvious good sense, and recognizes the legislative determination to permit expansion by financial institutions in one form, while curtailing it in others.

Petitioner's reliance on the District of Columbia Circuit's decision in *Whitney National Bank, supra,*—which was reversed by this Court in order to give the Board the opportunity to rule on the effect of Louisiana's then newly-enacted bank holding company statute on Whitney National Bank's proposals,[8] 379 U.S. 411 (1965)—is misplaced. In that case, the District of Columbia Circuit discerned an "elaborate and ingenious scheme" involving sham corporations designed for the sole purpose of evading branch-banking restrictions, thus requiring it to "pierce the corporate veil" and enjoin one bank from doing business through another in violation of the law. The facts in the instant case, as determined both by the Board and the court below, demonstrate that Bancshares is a "traditionally recognized bank holding company which, with its own capital, invests in or buys the stock of banks" in the manner approved by the District of Columbia Circuit in *Whitney*. 323 F. 2d at 303. In light of the Missouri legislation which specifically authorizes the operation of multi-bank holding companies, the court below was plainly correct in limiting to cases of "fraud or complete subterfuge" the principle sought to be invoked by petitioner in this case.[9] *Grandview Bank &*

[8] The importance of an initial determination of such issues by the Board was emphasized because (379 U.S. at 420):

> Congress has set out in the Bank Holding Company Act of 1956 a carefully planned and comprehensive method for challenging Board determinations. That action by Congress was designed to permit an agency, expert in banking matters to explore and pass on the ramifications of a proposed bank holding company arrangement.

[9] Petitioner errs in suggesting that the decision of the court below conflicts with that of the Ninth Circuit in *First National Bank in Billings* v. *First Bank Stock Corporation*, 306 F.2d 937 (1962), or with the court's own decision in *Commercial National Bank in Little Rock* v. *Board of Governors*, 451 F.2d 86 (1971). In *Billings*, the Ninth Circuit stated that, in order to establish that a bank holding company's acquisition of an additional banking

Trust, supra., 550 F. 2d at 420. Any further review of this matter in this Court is unwarranted.

B. Competitive Considerations

Petitioner complains that the Court of Appeals sustained the Board's determination that the relevant banking market consisted of a six-county area comprising the Kansas City banking market, rather than Jackson County alone as contended by petitioner.[10] However, the

subsidiary will violate prohibitions against branch-banking, opponents of the arrangement must demonstrate that (306 F.2d at 942):

> [I]n substance, [an existing banking subsidiary of the holding company] is doing business through the instrumentality of [the new banking subsidiary], or vice versa, in the same way as if the two institutions were one (Citation omitted). We do not agree with appellees that the fact that the two banks are separate corporate organizations demonstrates conclusively that one is not a branch of the other. In the banking field, as elsewhere, courts have power to "pierce the corporate veil" when the realities require it.
>
> On the other hand, it is not enough for appellants to show that common control, through stock ownership by [the holding company] which participates actively in the management of its subsidiaries, produces cooperation or even eliminates competition between the subsidiaries. This is a usual, although not necessary, result of common ownership and control.

Precisely the same test was applied by the Eighth Circuit in *Commercial National Bank, supra*, 451 F.2d at 90, as well as in the instant case.

[10] Petitioner's additional argument (Pet. 12-15) that Bancshares' acquisition of the New Bank somehow resulted in an unlawful concentration of deposits or in monopoly is outside the questions set forth in the petition, and therefore inappropriate for consideration by this Court pursuant to Rule 23(1)(c). *Andrews* v. *Louisville & Nashville R. Co.*, 406 U.S. 320 (1972). In addition, the argument is frivolous: with the record demonstrating that Bancshares' share of deposits in the relevant banking market amounted to only 13.86% in 1974 (rather than the 30% figure erroneously claimed by petitioner), and the next two largest organizations holding 12.44% and 10.79%, respectively, the Court of Appeals was plainly correct in sustaining the Board's determination that a new entry by Bancshares into Grandview "would not increase the concentration

record showed that Grandview is a "bedroom community" many of whose residents commute, on major arteries which traverse the city, to employment in other parts of the Kansas City area, with the result that banks throughout that area compete for their patronage [11] (R. 307, 308). The Reserve Bank accordingly reported to the Board that (R. 326):

> [T]he entire area encompassed by its six-county market definition constitutes the relevant banking market, and that Jackson County is in no way isolated or separate from the rest of the urbanized Kansas City SMSA.

With this record before it, the Court of Appeals was clearly correct in concluding that (550 F. 2d at 420):

> In determining the relevant market area we must give great weight to the expertise of the Board which is familiar with the competitive structure of the area involved. The evidence clearly supports the Board's findings here.

Indeed, whatever the relevant market selected for measuring the competitive effect of the proposal, it would be a novel antitrust posture to conclude that a new expansion within that market, to a location removed from offices maintained by other subsidiaries of the holding company, would create significant anticompetitive con-

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of banking resources in Missouri", but rather would have procompetitive effects in providing an additional local banking alternative. R. 319, 320, 437; *Grandview Bank & Trust, supra*, 550 F.2d at 420.

[11] Indeed, in its representations to the Board during the administrative process, petitioner argued that the City of Grandview was not an "isolated corporate community" since it was "completely surrounded by the corporate limits of Kansas City, Missouri, and may be traversed in any direction in a matter of minutes" (R. 287, 288).

sequences.[12] No justification for further review of this question has been advanced by petitioner.

C. The Procedures Employed by the Board Were Fair to Petitioner

Petitioner contends that it was denied due process through the Board's refusal of its request for a hearing; the unavailablity of discovery procedures; the confidential treatment accorded to certain portions of the agency record; and because of an alleged conflict of interest. However, where a bank holding company such as Bancshares seeks authority to expand *de novo* through acquisition of shares of a newly chartered bank, the pertinent federal statute requires a hearing *only* if within thirty days after being notified of the filing of the application, the Comptroller (in the case of a national bank) recommends disapproval. 12 U.S.C. § 1842(b). In this case, the Comptroller recommended approval (R. 378, 379). In such circumstances, the Board was clearly not required by statute to hold a hearing;[13] and, with

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[12] Petitioner errs in claiming that the Board's determination of the relevant market conflicts with this Court's pronouncements in *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963), and *United States* v. *Phillipsburg National Bank*, 399 U.S. 350 (1970). In both the *Philadelphia* and *Phillipsburg* cases, this Court dealt with mergers between actual competitors, which eliminated one from the market; by contrast, the instant transaction, although structured as an acquisition, is in reality a new entry by Bancshares which will increase the number of operating banks. Thus, the competitive circumstances in the cases cited by petitioner bear no resemblance to this one. Nonetheless, in light of the evidence establishing that Grandview is a bedroom community with a heavy population of commuters, the relevant market area delineated by the Board fully accords with this Court's statement that it "must be charted by careful selection of the market area in which the seller operates and to which the purchaser can practicably turn for supplies . . . ." *Philadelphia, supra*, 374 U.S. at 359; *Phillipsburg, supra*, 399 U.S. at 362.

[13] Every circuit court to consider the question has ruled that, except where provided for by the statute, the Board is not required by the Constitution to hold hearings in connection with proceedings

no real dispute regarding the underlying facts, and petitioner afforded ample opportunity to submit written views and documentary evidence, there was plainly no impropriety in denying to petitioner the hearing which the Board nonetheless reserves the right to provide at its discretion.[14]

Petitioner's complaint at the denial of discovery procedures also misses the mark: such procedures were deliberately withheld by Congress from utilization in proceedings before the Board under the Bank Holding Company Act, with the result that the Board was powerless to authorize their use.[15] Petitioner's remaining charges

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under § 3 of the Bank Holding Company Act. *Kirsch* v. *Board of Governors*, 353 F.2d 353, 356 (6th Cir. 1965); *First Wisconsin Bankshares Corporation* v. *Board of Governors*, 325 F.2d 946, 960 (7th Cir. 1963); *Northwest Bancorporation* v. *Board of Governors*, 303 F.2d 832, 842 (8th Cir. 1962); *Commercial National Bank of Little Rock* v. *Board of Governors*, 451 F.2d 86, 90, 91 (8th Cir. 1971); *Bank of Boulder* v. *Board of Governors*, 535 F.2d 1221, 1224 (10th Cir. 1976).

[14] Although not required by law, a hearing may nonetheless be held by the Board on a bank holding company application if it determines such a course of action to be "desirable." 12 C.F.R. § 262.3(g)(2). When pressed by the Board to give "reasons why a written presentation would not suffice in lieu of a formal hearing," petitioner's response pointed to no factual dispute capable of resolution at a hearing, but, instead, voiced the hope—based on its erroneous belief that discovery procedures would be available to it—that it could thereby obtain evidence to substantiate the charges of illegality it had already made (R. 365, 374, 375).

[15] In the Congressional debate which preceded enactment of the Bank Holding Company Act of 1956, an amendment was introduced by Senator Morse which would have given the Board or its designee the authority "to administer oaths and affirmations, and by subpoena to require any person to appear and testify, or to appear and produce relevant books, records and other papers." 102 Cong. Record 6959 (1956). Over the vigorous objection of Senator Morse, who characterized as a "major defect in the bill" the absence of a provision for subpoena power in the Board, the amendment which would have remedied that omission was defeated (*Id.*) In subsequent proceedings under the Bank Holding Company Act, the Board itself has recognized its inability to

of procedural unfairness are easily disposed of. The "deletions in the record" complained of—which in the aggregate comprise only a tiny portion of the agency record—consisted of (1) a list, submitted by Bancshares in confidence to the Board, of loans made by its subsidiary banks, where the collateral consisted of more than 5% of the stock of a bank; and (2) certain portions of memoranda prepared by the Board's staff which expressed ultimate recommendations, legal and economic advice and opinions, and information taken from reports of Bancshares' subsidiary banks. The Board's action in withholding such material from the public record accords with its own regulations [16] as well as the Freedom of Information Act,[17] and petitioner has, in any event, been unable to demonstrate disadvantage therefrom; accordingly, the Court of Appeals properly declined to order the Board to provide petitioner with access thereto. Petitioner's claim of conflict-of-interest is spurious: Bancshares' Chairman of the Board did not commence service as a Class A director of the Federal Reserve Bank of Kansas City [18] until long after the Reserve Bank

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authorize discovery procedures. See, e.g., *Northwest Bancorporation*, 59 Fed. Res. Bull. 701, 704 (September, 1973); *Mellon National Corporation*, 62 Fed. Res. Bull. 702, 712 (August, 1976).

[16] See 12 C.F.R. § 261.6(a)(2) and (3), § 261.6(c) (1976 Ed.).

[17] The material concerning the financial affairs of certain of its customers furnished by Bancshares in confidence to the Board was clearly exempt from disclosure by 5 U.S.C. § 552(b)(4). The nonfactual portions of memoranda of the Board's staff, and the information extracted from examination reports, were protected from disclosure by 5 U.S.C. § 552(b)(8), as well as the privilege afforded the deliberative processes of the agency and its staff. Since detailed administrative findings were made at the same time as the decision, and there has been absolutely no showing of bad faith on the part of the Board, there is no predicate for making inquiry into the mental processes of the decision-makers. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420 (1970); *United States* v. *Morgan*, 313 U.S. 409, 422 (1941).

[18] The Federal Reserve Act requires that Class A directors be representatives of the member banks of that reserve district. 12 U.S.C. § 302.

concluded its investigation and submitted a report thereon to the Board;[19] and, in any event, the Reserve Bank acted only as investigator, not decision-maker,[20] with respect to Bancshares' application. The Court of Appeals was plainly correct in rejecting petitioner's contrived allegations of procedural unfairness.[21]

II. BANCSHARES' ACQUISITION OF THE NEW BANK MAY BE SUPPORTED ON GROUNDS WHOLLY INDEPENDENT OF THE BOARD'S ORDER. THE PETITION SHOULD, THEREFORE, BE DISMISSED AS MOOT

Under the terms of the Bank Holding Company Act, Bancshares' authority to acquire and hold the shares of the New Bank may be grounded upon either (1) the Board's prior approval pursuant to 12 U.S.C. § 1842(a) of an application of Bancshares to effect such acquisition, or (2) the Board's failure to act in timely fashion upon such an application, resulting in its approval by operation of law as provided for by 12 U.S.C. § 1842(b). The court below focussed on the first basis for the necessary

[19] The Reserve Bank's report on Bancshares' application was submitted to the Board on May 20, 1975 (R. 292); the appointment as Reserve Bank director did not become effective until January 1, 1976. 62 Fed. Res. Bull. 169, 179 (February, 1976).

[20] The Reserve Bank's role was limited to an investigatory one because Bancshares' application was protested (R. 242). In any event, the Board's published regulations preclude a Reserve Bank from acting (under delegated authority) in a decision-making capacity in the event that an official of the bank holding company is also a director of the Reserve Bank. 12 C.F.R. § 265.2(a)(3)(i)(a) (1976 Ed.).

[21] Petitioner's claim that the Comptroller's approval of the New Bank's charter application had been withdrawn (Pet. 25) is outside the questions set forth in the petition, and is therefore inappropriate for review by this Court. *Andrews* v. *Louisville & Nashville R. Co.*, *supra*, 406 U.S. at 325. In any event, this claim was properly found to be "without merit" by the court below. *Grandview Bank & Trust*, *supra*, 550 F.2d at 421.

authority in Bancshares, and affirmed the Board's approval Order. While Bancshares believes that the Court of Appeals properly determined the Board's Order to be lawful and well supported by the record, Bancshares additionally contends—as it did in the court below—that the alternative support for its acquisition of the New Bank, found in approval of its application by operation of law, is not dependent upon the validity of the Board's Order, with the result that the issues raised by the petition are rendered moot. *De Funis* v. *Odegaard*, 416 U.S. 312 (1974).

Thus, referring to applications by bank holding companies for authority to acquire control of banks, the statute provides (12 U.S.C. § 1842(b)):

> In the event of the failure of the Board to act on any application for approval under this section within the ninety-one-day period which begins on the date of submission to the Board of the complete record on that application, the application shall be deemed to have been granted.

The cases dealing with this provision have construed the statute to mean that:

> [T]he 91-day period of § 1842(b) begins to run when the final material needed for the Fed's decision is received from the various interested sources outside of the Fed, which would ordinarily be the applicant and government agencies other than the Fed.

Tri-State Bancorporation v. *Board of Governors*, 524 F. 2d 562, 566 (7th Cir. 1975).[22]

The record in this case reveals that the timetable followed by the Board did not comport with the mandate

[22] Accord, *North Lawndale Economic Development Corporation* v. *Board of Governors*, Civil No. 76-1607 (7th Cir., filed March 31, 1977); *First Lincolnwood Corporation* v. *Board of Governors*, 546 F.2d 718 (7th Cir. 1976); *Memphis Trust Company* v. *Board of Governors*, Civil No. C-76-64, (W.D. Tenn., filed June 4, 1976).

of the statute. The application was filed by Bancshares with the Reserve Bank on March 5, 1975 (R. 1), and was pronounced by the Reserve Bank to be "complete and ready for consideration by the Board" on April 15, 1975 (R. 242). The period set by the Board for receipt of comments on the application from the public ended on May 27, 1975 (R. 248). The Comptroller was notified of the filing of the application in mid-April, 1975 (R. 244), and the statutory period which § 1842(b) allows for submission of the Comptroller's views expired thirty days thereafter. It thus appears that on May 27, 1975 the Board had before it an application which was complete and ready for consideration, and both the statutory period allowed for the submission of views of the bank's supervisor and the administrative period established by the Board for the submission of comments from the public had expired. That date, we believe, marks the "submission to the Board of the complete record" on the application.[22] 12 U.S.C. § 1842(b). Accordingly, upon the failure of the Board to act upon the application within the 91-day period ending on August 26, 1975, the application was approved by operation of the law. That being the case, even were this Court to find in the petition some special or important reason to review the Court of Appeals' affirmation of the Board's Order, that review—regardless of its conclusion—could not accord to petitioner the relief sought, because Bancshares' acquisition of the New Bank must nevertheless be sustained on the basis of this independent statutory authorization.

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[22] Numerous submissions were received by the Board from Petitioner after the period established for public comment expired on May 27, 1975 (R. 248; 380-385; 390-398; 407; 409-414; 419; 420; 424-427). However, the Board was powerless to toll the commencement of the time period prescribed by Congress through acquiescence in petitioner's efforts to perpetuate the administrative proceedings; otherwise the 91-day period would have no meaning.

CONCLUSION

For the foregoing reasons, Bancshares submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

STATUTORY APPENDIX

12 U.S.C. § 1842(a), (b), (c) provide that:

12 U.S.C. 1842.—(a) It shall be unlawful, except with the prior approval of the Board, (1) for any action to be taken that causes any company to become a bank holding company; (2) for any action to be taken that causes a bank to become a subsidiary of a bank holding company; (3) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank; (4) for any bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank; or (5) for any bank holding company to merge or consolidate with any other bank holding company. Notwithstanding the foregoing this prohibition shall not apply to (A) shares acquired by a bank, (i) in good faith in a fiduciary capacity, except where such shares are held under a trust that constitutes a company as defined in section 2(b) and except as provided in paragraph (2) and (3) of section 2(g), or (ii) in the regular course of securing or collecting a debt previously contracted in good faith, but any shares acquired after the date of enactment of this Act in securing or collecting any such previously contracted debt shall be disposed of within a period of two years from the date on which they were acquired; or (B) additional shares acquired by a bank holding company in a bank in which such bank holding company owned or controlled a majority of the voting shares prior to such acquisition. For the purpose of the preceding sentence, bank shares acquired after the date of enactment of the Bank Holding Company Act Amendments of 1970 shall not be deemed to have been acquired in good faith in a fiduciary capacity if the acquiring bank or company has sole discretionary authority

to exercise voting rights with respect thereto; but in such instances acquisitions may be made without prior approval of the Board if the Board, upon application filed within ninety days after the shares are acquired, approves retention or, if retention is disapproved, the acquiring bank disposes of the shares or its sole discretionary voting rights within two years after issuance of the order of disapproval.

(b) Upon receiving from a company any application for approval under this section, the Board shall give notice to the Comptroller of the Currency, if the applicant company or any bank the voting shares or assets of which are sought to be acquired is a national banking association or a District bank, or to the appropriate supervisory authority of the interested State, if the applicant company or any bank the voting shares or assets of which are sought to be acquired in a State bank, and shall allow thirty days within which the views and recommendations of the Comptroller of the Currency or the State supervisory authority, as the case may be, may be submitted. If the Comptroller of the Currency or the State supervisory authority so notified by the Board disapproves the application in writing within said thirty days, the Board shall forthwith give written notice of that fact to the applicant. Within three days after giving such notice to the applicant, the Board shall notify in writing the applicant and the disapproving authority of the date for commencement of a hearing by it on such application. Any such hearing shall be commenced not less than ten nor more than thirty days after the Board has given written notice to the applicant of the action of the disapproving authority. The length of any such hearing shall be determined by the Board, but it shall afford all interested parties a reasonable opportunity to testify at such hearing. At the conclusion thereof, the Board shall by order grant or deny the application on the basis of the record made at such hearing. In the event of the failure of the

Board to act on any application for approval under this section within the ninety-one-day period which begins on the date of submission to the Board of the complete record on that application, the application shall be deemed to have been granted.

(c) The Board shall not approve—

(1) any acquisition or merger or consolidation under this section which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

(2) any other proposed acquisition or merger or consolidation under this section whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anti-competitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

In every case, the Board shall take into consideration the financial and managerial resources and future prospects of the company or companies and the banks concerned, and the convenience and needs of the community to be served.

12 U.S.C § 1848 provides that:

12 U.S.C. 1848.—Any party aggrieved by an order of the Board under this chapter may obtain a review of such order in the United States Court of Appeals within any circuit wherein such party has its principal place of business, or in the Court of Appeals in the District of Columbia, by filing in the court, within thirty days after

the entry of the Board's order, a petition praying that the order of the Board be set aside. A copy of such petition shall be forthwith transmitted to the Board by the clerk of the court, and thereupon the Board shall file in the court the record made before the Board, as provided in section 2112 of Title 28, United States Code. Upon the filing of such petition the court shall have jurisdiction to affirm, set aside, or modify the order of the Board and to require the Board to take such action with regard to the matter under review as the court deems proper. The findings of the Board as to the facts, if supported by substantial evidence, shall be conclusive.

R.S. Mo. § 362.105(1) provides, as here pertinent, that:

362.105. *Powers and authority of banks and trust companies.*—1. Every bank and trust company created under the laws of this state may:

(1) Conduct the business of receiving money on deposit and allowing interest thereon not exceeding the legal rate or without allowing interest thereon, and of buying and selling exchange, gold, silver, coin of all kinds, uncurrent money, of loaning money upon real estate or personal property, and upon collateral of personal security at a rate of interest not exceeding that allowed by law, and also of buying, investing in, selling and discounting negotiable and nonnegotiable paper of all kinds, including bonds as well as all kinds of commercial paper; and for all loans and discounts made, the corporation may receive and retain the interest in advance; provided, however, that no bank or trust company shall maintain in this state a branch bank or trust company, or receive deposits or pay checks except in its own banking house or as provided in section 362.107;

R.S. Mo. § 362.915 provides that:

Limitation on bank holding company—total deposits, how computed.—It is unlawful for any bank holding

company to obtain control of any bank if the total deposits in the bank together with the total deposits in all banks in Missouri controlled by the bank holding company exceed thirteen percent of the total bank deposits in all banks in the state, determined as of the date of the last simultaneous request for reports of condition issued by the Federal Deposit Insurance Corporation, the Comptroller of the Currency and the director of finance of the state of Missouri, for which totals are available, preceding the date the bank holding company files an application with the division of finance as required by sections 362.910 to 362.940, except that the reports at mid-year and year end shall not be used for such purpose. In computing the total bank deposits in all banks controlled by the bank holding company and the bank which the holding company seeks to acquire, there shall be deducted from total deposits, certificates of deposit in the face amount of one hundred thousand dollars or more, deposits from sources outside the United States, and deposits of banks other than banks controlled by the bank holding company.

R.S. Mo. § 362.920 provides that:

Procedure to obtain order allowing acquisition—duty of director.—1. A bank holding company which seeks to acquire control of a bank or a bank holding company shall file with the division of finance a copy of any application which the bank holding company is required to file with the Board of Governors of the Federal Reserve System, together with such supplemental data as will enable the director of finance to determine if the acquisition is lawful under the provisions of section 362.915. The director of finance shall, within thirty days after receiving the application, issue his order declaring the acquisition to be lawful or unlawful under the provisions of section 362.915. The order of the director shall be the final administrative decision which

may be appealed in the circuit court or court of common pleas of the county of proper venue within thirty days after the mailing or delivery of notice of the director's order, by any party aggrieved by the order.

2. The director shall also determine if the proposed acquisition of a bank by a bank holding company is consistent with the interests of promoting and maintaining a sound banking system and sound trust companies, the security of deposits and depositors and other customers, the preservation of the liquid position of banks and in the interest of preventing injurious credit expansions and contractions. If the director determines that the proposed acquisition is not consistent with those objectives, he shall, within thirty days of receipt of the application, communicate his objections to the proposed acquisition to the Board of Governors of the Federal Reserve System.

3. The provisions of section 362.915 and subsections 1 and 2 of this section shall not apply in the case of the acquisition of a bank or bank holding company acquired at the request of the director of finance, the Federal Deposit Insurance Corporation or the Board of Governors of the Federal Reserve System in order to prevent the imminent failure of a bank.

Supreme Court, U. S.
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No. 76-1554

In the Supreme Court of the United States

OCTOBER TERM, 1977

GRANDVIEW BANK AND TRUST COMPANY, PETITIONER

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 550 F. 2d 415. The order of the Board of Governors of the Federal Reserve System (Pet. App. A14-A18) is reported at 41 Fed. Reg. 12093.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1977. The petition for a writ of certiorari was filed on May 9, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the findings of the Board of Governors of the Federal Reserve System that

the acquisition of the newly established Commerce Bank of Grandview, N.A., by Commerce Bancshares, Inc., would not violate Missouri law prohibiting branch banking, would not have anticompetitive effects, would be consistent with the financial and managerial resources of the institutions concerned, and would serve the convenience and needs of the community.

2. Whether petitioner was denied due process in the administrative proceedings before the Board of Governors.

STATEMENT

After obtaining preliminary approval from the Comptroller of the Currency to charter a new national bank in Grandview, Missouri (R. 10-11, 252),[1] Commerce Bancshares, Inc. ("Bancshares"), a bank holding company within the meaning of the Bank Holding Company Act of 1956 (70 Stat. 133, as amended, 12 U.S.C. 1841 *et seq.*) applied to the Federal Reserve Board for approval under Section 3(a)(3) of the Act, 12 U.S.C. 1842(a)(3), to acquire the voting shares of the proposed Commerce Bank of Grandview, N.A. ("New Bank").[2] Petitioner, currently the only bank in Grandview, opposed the application and requested a hearing. The Board denied petitioner's request, noting that the record was sufficiently complete to enable it to render a decision[3] and that under Section 3(b) of the Act, 12 U.S.C.

[1]"R." refers to the record in the court of appeals.

[2]Under 12 U.S.C. 1842(a)(3), a bank holding company must obtain the approval of the Federal Reserve Board to acquire direct or indirect ownership or control of any voting shares of a bank if, after such acquisition, such company will directly or indirectly own or control more than 5 percent of the voting shares of such bank.

[3]The Missouri director of finance had approved Bancshares' proposal pursuant to Mo. Rev. Stat. §362.920 (1976 Supp.), and the Reserve Bank of Kansas City and the Comptroller of the Currency had submitted their memoranda recommending approval of Bancshares' application (Pet. App. A2, n. 3).

1842(b), it was not required to hold a hearing in cases where the Comptroller has recommended approval (Pet. App. A2).

The Board found that "consummation of the proposal would not eliminate any existing competition, nor does it appear that the proposal would have adverse effects on potential competition" and that the acquisition "may increase competition in this area through the introduction of another competitor" (R. 436-437).[4] The Board also found that Bancshares' and New Bank's financial and managerial resources and future prospects were satisfactory (R. 437). Since there is only one bank located in Grandview and the proposal would introduce into that area "an alternative source of a full range of banking services," the Board concluded that the proposal would serve the convenience and needs of the community (R. 437). Finally, the Board concluded that the proposed acquisition would not violate Missouri's law prohibiting branch banking because Bancshares and New Bank would not constitute a unitary banking operation (R. 438-439; footnote omitted):

> [New] Bank will be a separate corporation, with its own reserve requirements and capital stock and a loan limit based on such capital stock; that Bank will be managed by its own officers; that Bank's board of directors will be generally separate and independent from the boards of Applicant and of Applicant's subsidiaries; and that Bank will maintain its own separate books of account, issue its own distinctive checks, and use its own stationery. Applicant further states that Bank will be managed by its own local officers and that money

[4]The Board found the relevant banking market to be Clay, Jackson, and Platte Counties and the northern half of Cass County, Missouri, and Johnson and Wyandotte Counties, Kansas.

deposited at Bank will not be credited to the account of a depositor at any other banking subsidiary of Applicant and, conversely, any money deposited at any other banking subsidiary of Applicant will not be credited to the account of a depositor at Bank.

Accordingly, the Board concluded that "consummation of the subject proposal would be in the public interest and that the application to acquire [New] Bank should be approved" (R. 439-440).

On review the court of appeals affirmed in a thorough opinion (Pet. App. A1-A14).

ARGUMENT

Petitioner's arguments principally concern the application of settled legal principles to the particular facts of this case and do not warrant further review.[5]

1. Petitioner's major contention (Pet. 7) is that Bancshares is not a traditionally recognized bank holding company, that Bancshares' affiliates are doing business as a "unitary operation," and that the acquisition of New Bank would constitute *de facto* branch banking in violation of Missouri's branch banking laws.[6] Petitioner argues that

[5]Pursuant to Section 9 of the Act, 12 U.S.C. 1848, "[t]he findings of the Board as to the facts, if supported by substantial evidence, shall be conclusive." Under this standard, appellate review of a decision of the Board is narrowly limited. *Alabama Association of Insurance Agents* v. *Board of Governors*, 533 F. 2d 224, 246 (C.A. 5); *Commerical National Bank of Little Rock* v. *Board of Governors*, 451 F. 2d 86, 90 (C.A. 8); *Northwest Bancorporation* v. *Board of Governors*, 303 F. 2d 832, 841 (C.A. 8); *First Wisconsin Bankshares Corporation* v. *Board of Governors*, 325 F. 2d 946, 948 (C.A. 7).

[6]Mo. Rev. Stat. §362.105.1(1) (1968) provides, in pertinent part, that "no bank or trust company shall maintain in this state a branch bank or trust company, or receive deposits or pay checks except in its own banking house or as provided in section 362.107 [which allows one

Whitney National Bank v. *Bank of New Orleans*, 323 F. 2d 290 (C.A. D.C.), reversed on other grounds, 379 U.S. 411, is controlling. In *Whitney*, the holding company's only subsidiaries were to be two banks, and the intention was to run them as a unitary operation. The transaction was simply a subterfuge for the establishment of a branch office. By contrast, Bancshares' affiliates are not operated as a single integrated bank. There is simply no showing that New Bank will, within the purview of 12 U.S.C. 36(f), operate to receive deposits, pay checks, or lend money on behalf of Bancshares' other subsidiaries. The Board's finding that the acquisition of New Bank would not be branch banking is supported by substantial evidence and the court of appeals' affirmance of that finding presents no conflict with *Whitney*.[7]

Petitioner also challenges the Board's conclusion that Bancshares' acquisition of New Bank will not result in a monopoly or have an anticompetitive effect. But petitioner points to no facts that rebut the Board's finding that the New Bank's "acquisition by [Bancshares] would not increase the concentration of banking resources in Missouri nor change [Bancshares'] rank among banking organizations in the

automobile banking facility]." Since national banks are prohibited from branching if a state bank in an identical situation would be so prohibited by state law, 12 U.S.C. 36, a national banking association in Missouri may not establish branches.

[7]There is no merit to petitioner's contention that New Bank will be controlled by officers and directors of Bancshares. Bancshares' application to the Board disclosed that the New Bank's permanent directors would be business and civic leaders from the Grandview area; the New Bank would be managed by its own supervisory personnel and officers appointed by its own Board of Directors, with the New Bank's employees free from control by management of Bancshares' banking subsidiaries. Cf. *First National Bank in Billings* v. *First Bank Stock Corp.*, 306 F. 2d 937, 942 (C.A. 9).

State" (R. 436). Instead, petitioner argues (Pet. 24-25) that in measuring competitive impact the Board should have looked only to Jackson County rather than to the six-county Kansas City area (see note 4, *supra*). The Federal Reserve Bank of Kansas City, however, analyzed the application and concluded that because of economic and demographic considerations "Jackson County is in no way isolated or separate from the rest of * * * urbanized Kansas City" and therefore that "the entire area encompassed by its six-county market definition constitutes the relevant banking market" (R. 326). This report was part of the record before the Board,[8] which considered and rejected petitioner's contrary contention. The Board's determination, which the court of appeals sustained as supported by substantial evidence, does not raise any issue warranting plenary review by this Court.

2. Petitioner contends that it was denied due process in that it was not allowed a hearing before the Board. There was, however, a hearing before the Comptroller of the Currency on Bancshares' application to acquire New Bank, and petitioner fully participated in that proceeding (R. 252, 266-269). Since the Comptroller approved the application, no further hearing was required before the Board. 12 U.S.C. 1842(b). See *Commercial National Bank of Little Rock* v. *Board of Governors*, 451 F. 2d 86, 90-91 (C.A. 8); *Bank of Boulder* v. *Board of Governors*, 535 F. 2d 1221, 1224-1225 (C.A. 10); *Kirsch* v. *Board of Governors*, 353 F. 2d 353, 356 (C.A. 6); *First Wisconsin Bankshares Corporation* v. *Board of Governors*, 325 F. 2d 946, 960 (C.A. 7).

Petitioner argues (Pet. 25-28) that it was improperly denied access to portions of the staff memoranda furnished

[8]12 C.F.R. 225.3(a) and 262.3 require that an application for approval by the Board be filed with the Federal Reserve Bank and that the Reserve Bank make such investigation as may be necessary.

to the Board.[9] But the few deletions from the staff memoranda involved ultimate staff recommendations on the application, legal and economic analyses, opinion and advice, and certain confidential information derived from an examination of Bancshares' subsidiary banks. The Board's practice of deleting such materials from the public record accords with the Freedom of Information Act[10] and the Board's published regulations,[11] and did not deny petitioner due process. *National Courier Association* v. *Board of Governors*, 516 F. 2d 1229, 1241-1243 (C.A. D.C.).[12]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1977.

[9]Petitioner also argues that there was a conflict of interest in that the Chairman of the Board of Bancshares was a director of the Kansas City Reserve Bank. However, the Reserve Bank acted only as an investigator and not as a decision-maker. See 12 C.F.R. 265.2(a)(3)(i)(*a*).

[10]5 U.S.C. 552(b)(4) and (8).

[11]12 C.F.R. 261.6(a)(2) and (3), 261.6(c).

[12]Similarly, the Board's confidential treatment of Bancshares' estimates or projections for the first three years of New Bank's operations, and of the list of loans made by Bancshares' subsidiary banks collateralized with over 5 percent of a bank's stock, was warranted. *Commercial National Bank of Little Rock* v. *Board of Governors*, *supra*, 451 F. 2d at 91.

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